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TABLE OF CONTENTS

NEGLIGENCE: A SYMPOSIUM

Introduction .... *Edward A. Bogdan, Jr.* 1

Preparation of a Negligence Action for Trial *Samuel M. Hesson* 2

The Evaluation of a Personal Injury Action for Purposes of Settlement...... *Leonard H. Amdursky* 15

Trial of a Negligence Action....... *John W. Tabner* 23

Evidentiary Considerations in the Trial of Negligence Actions .... *Robert C. Winchell* 33

Preparation and Argument of an Appeal *John R. Davison* 51

COMMENTS

A Re-Examination of Bridges v. California........ 61

Anti Discrimination Legislation as It Affects Real Property Rights 75

The Protection of Indigent Defendants' Right to Counsel in New York State.................. 93

Appointment of Counsel as a Matter of Right in Criminal Appeals 114

Double Recovery of Medical Payments............ 126

Drums along the Power Ways.................... 135

Motion Picture Censorship Re-Examined.......... 152

TABLE OF CONTENTS

RECENT DECISIONS

Bills and Notes—Defect in Plaintiff's Title as a Defense Available to the Drawer Bank (*International Firearms Co. v. Kingston Trust Co.,* 6 App. Div. 2d 171, 175 N.Y.S.2d 794—1958).... 169

Confessions—Admissibility in Evidence When Voluntarily Made During Illegal Detention (*People v. Spano,* 4 N.Y.2d 256, 152 N.E.2d 657, 173 N.Y.S. 2d 793—1958 and *People v. Scully,* 4 N.Y. 2d 453, — N.E.2d —, 176 N.Y.S.2d 300 — 1958) 176

Constitutional Law—Validity of Ordinance Requiring Three Year Conformity or Cessation of Nonconforming Use (*Matter of Harbison v. City of Buffalo,* 4 N.Y.2d 553, 152 N.E.2d 42, 176 N.Y.S. 2d 598—1958) 181

Damages—Mental Anguish—Recovery for Apprehension of Future Consequences (*Ferrara v. Galluchio,* 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996—1958) 191

Labor Law—Picketing—Injunctions—Jurisdiction of State Court (*Pleasant Valley Packing Co. v. Talarico,* 5 N.Y.2d 40, 152 N.E.2d 505, 177 N.Y.S. 2d 473—1958) 196

Penal Law—Misleading Advertising—Immateriality of Subjective Interpretations (*People v. Minjac Corporation,* 4 N.Y.2d 320, 151 N.E.2d 180, 175 N.Y.S.2d 16—1958) 203

TABLE OF CONTENTS

Service of Process—Immunity from (*Thermoid Company v. Fabel,* 4 N.Y.2d 494, 151 N.E.2d 883, 176 N.Y.S.2d 331—1958) 209

Tort—Fraud and Deceit Applied to Matters of Opinion (*Channel Master Corp. v. Aluminum Ltd. Sales,* 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259—1958) 214

Vehicle and Traffic Law—Interpretation of (*People v. Shapiro,* 4 N.Y.2d 597, 152 N.E.2d 65, 170 N.Y.S.2d 712—1958) 220

DIGEST OF CURRENT N.Y. DECISIONS 228

LEGISLATION

Real Property Law §§ 346, 347 239

Real Property Law § 345 240

Real Property Law § 348 241

Vehicle and Traffic Law §§ 52, 52-a 242

Vehicle and Traffic Law §§ 59, 59-a 243

TABLE OF CONTENTS

ARTICLES

Election of Certain Small Business Corporations as to Taxable Status. . *Thomas C. Plowden-Wardlaw* 245

Consumer Credit Regulation. . . . . . *Alfred I. Maleson* 297

COMMENTS

Does New York State Have a Kangaroo Court?. 315

Discovery and Inspection in New York Negligence Litigations 336

Injunction of Crimes Without Statutory Authority. . . 361

The Effect of Pupil Placement Laws upon Southern Education 376

What Constitutes a Public Use. 386

RECENT DECISIONS

Condemnation Proceedings—Invalid When Used for Private Benefit 399

Constitutional Law—Denial of Suspension of Integration 405

Constitutional Law — Equal Protection — Parents' Right to Reject Inferior Education in Racially Segregated Schools 412

Criminal Law — Immunity from Prosecution — Penal Law § 2447 418

TABLE OF CONTENTS

Domestic Relations — Custody of Minor Children — Courts Power as *Parens Patriae* 424

Husband and Wife—Separation Judgment Res Judicata Upon Actions for Declaratory Judgment and Annulment 434

Municipal Corporations — Liability for Negligence — Failure to Provide Adequate Police Protection .. 441

Public Nuisance — Special Damage — Extent of 447

Sales — Privity of Contract — Warranties 451

DIGEST OF CURRENT N.Y. DECISIONS 458

LEGISLATION

Civil Practice Act § 232 471

Negotiable Instruments Law § 174 473

Real Property Law § 226-a......................... 475

Real Property Law § 232 476

Vehicle and Traffic Law § 93-a 478

TABLE OF CASES 479

Negligence: A Symposium

Introduction

In including a symposium on Negligence in this issue of the Albany Law Review, the Editorial Board was faced with the decision of either codifying the existing negligence law or presenting a practical approach to the problems inherent in the successful determination of a negligence action. It was felt that the former was exhaustively covered in any one of many excellent texts. The Board was of the opinion that a greater service could be performed for our alumni, the majority of whom are practicing New York State attorneys, by a discussion of the difficulties encountered in prosecuting a negligence action.

The symposium itself consists of five articles, each of which presents a particular phase of a negligence action, commencing with its preparation and terminating upon appeal. Recognizing that more often than not a negligence action revolves about matters of fact rather than matters of law, emphasis has been placed upon the proper method of collecting, preserving and presenting the requisite evidence so vital to a successful adjudication of the case. It is hoped that the selected topics will prove of both benefit and interest to the reader.

The Editorial Board is extremely grateful to the contributors of this symposium for the time and effort expended in our behalf. The aid and cooperation of Professor Samuel M. Hesson of the Albany Law School and Louis S. Cifarelli, former Editor-In-Chief of the Albany Law Review, in the planning of the symposium is appreciatively acknowledged.

EDWARD A. BOGDAN, JR.
Editor-In-Chief
Albany Law Review

Preparation of a Negligence Action for Trial

SAMUEL M. HESSON *

Introduction

In most respects the preparation of an negligence case is like the preparation of any case for trial. The object is to have a full understanding of the issues of fact and law which will be presented to the court and to have the evidence upon the factual issues so marshalled as to induce the court to resolve those issues in your favor. The nature of the subject matter of the litigation, however, produces differences in the kind of an investigation which must be made. An action for an accounting will often necessitate an examination of voluminous books of account and other documentary evidence; in an action of ejectment it may be that a great deal of the preparation will be done in the record room of the county clerk's office. In a negligence action the court is concerned with determining what happened at a certain time and place. That determination will be made in the main by considering the testimony of persons who know what happened. There will be legal issues presented, too, and the attorney must be prepared to present his contentions on the law in the most effective manner. Most negligence actions are, however, won or lost on the facts and the major portion of this discussion will be directed to the preparation of the case for the litigation of the factual issues presented.[1]

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[1] Reference may be had on this subject to Cullinan and Clark, *Preparation for Trial of a Civil Action* (1956) published by the Committee on Continuing Legal Education of the American Law Institute, 133 South 36th Street, Philadelphia 4, Pa., and Frost, *Preparation of a Negligence Case* (1954) published by Practising Law Institute, 20 Vesey Street, New York 7, N. Y.

Interviewing the Witnesses

An attorney generally hears the story of the occurrence upon which the negligence action is based from his client in the first instance. If the client was not present or if he is disabled, the story will necessarily come from others. The story may involve the statement of many matters which are immaterial. It is nevertheless important that the attorney patiently hear his witness out. The preparation of the case involves a complete understanding of the case, its weak points as well as its strength. The strong points must be presented, the weak points must be met. If the client is allowed to make his statement without interruption, he may disclose matters requiring further investigation, leads to be followed up. The lawyer should make brief notes as the statement is made, including only those matters which are material, and those matters which are to be further investigated. When the client's statement is concluded, the attorney should interrogate him further on any matters which the statement of the transaction may have suggested.

The lawyer's interrogation of his client should embrace not only those matters suggested by the client's statement but also other matters occurring to the attorney but not theretofore touched upon at all. It is the lawyer's duty in preparing the case to ascertain what actually happened. He should look upon the testimony of his own client and other friendly witnesses with a critical eye.

Your client will have told you the precise time and place of the accident.[2] You should ascertain also the names, addresses and telephone numbers of your client, and all of the persons who were in the car with him, who was the owner of the car, his name, address and telephone number, and similar information as to the owner of the other car and all the persons who were in it as driver or passengers at the time of the accident. You should find out the name of your client's insurer and the limits of liability, and, in so far as possible the same information as to the owner and driver of the other car. Your client should be cross-examined as to road conditions, visibility, traffic lights and stop signs, the direction and speed of the vehicles, intersecting streets and grades of highways, the position of the vehicles on the highway before, at and after the time of impact, distances, the giving of or failure to give signals, and other details of the accident.

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[2] The illustration used herein is the common one of a collision between two motor vehicles. In most respects the preparation would be the same if the case involved an injury to a pedestrian, or injuries sustained due to defective premises, or injuries sustained due to any negligent conduct.

Inquiry must be made as to the damages sustained, the cost of repairing the car, if your client owned it, the period of time he was deprived of its use, the medical expenses actually incurred, the extent of the loss of income during the time he was unable to work. A report should be obtained from your client's physician as to the nature, extent and permanency of his injuries.

To the end that you may not be surprised at the trial, you should inquire whether your client has made any statements, oral or written, to any person about the accident.

Accumulation of Evidence

There is more to the preparation of a negligence case than getting the statements of your client and witnesses friendly to him. The client will inform you of relatives or friends who were with him at the time of the accident and their statements should, of course, be taken. The statements of the adverse party and his witnesses should also be taken if they can be obtained. In addition, inquiry should be made as to the identity of any other persons who were present at the scene of the accident, and the statements of such persons should be sought. If the client knows of no such witnesses, investigations should be made at the scene of the accident, or at any other source suggested by the statements made.

Information as to witnesses may be obtained some times from police officers who investigated the accident or from persons who live or work in the neighborhood where the accident occurred.

In so far as possible the statements of witnesses, including your own client, should be in writing or typewritten and signed.

The attorney should, of course, examine all police reports of the accident, motor vehicle accident reports, transcripts of motor vehicle bureau hearings, hospital records, receipted bills for car repair and various medical expenses incurred. A written authorization to inspect hospital records should be obtained from the client.

The attorney should view the scene of the accident as soon as possible, and have photographs taken where necessary. Photographs should also be taken of the damage done to the vehicles. The location of the damage is often the factor which determines which witnesses are telling the truth. A chart should be made showing the highway, intersecting streets, the location of traffic lights and stop signs, the position of the cars involved in the accident, and indicating the width of the streets and other distances involved.

A determination should be made as to whether expert medical testimony will be used. If it will be used, arrangements should be made with the expert witness and a hypothetical question prepared. In addition the attorney should familiarize himself with the nature of the injuries involved and the medical terminology by studying medical books and journals descriptive of those injuries.

The Discovery Process

The law provides a number of devices whereby evidence may be procured by a litigant against the will of the adverse party. The most important of these devices is the examination before trial,[3] including the physical examination of parties presenting claims for personal injuries.[4] The statutes also provide for the compulsory discovery of books, documents and things.[5] There is also the statutory device of requiring admissions to be made by the adverse party for the purpose of the pending litigation.[6] These devices cannot be ignored in the preparation of a negligence action, or any other action, for trial. Resort to one or more of them may result in the successful prosecution of an action which would otherwise be lost, or the successful defense of an action which would otherwise be established.

There is very often presented a preliminary question of policy or strategy before resort is had to the discovery process. A party may have his own testimony taken before trial if the taking of it is material and necessary.[7] The only purpose of the taking of such testimony is preservation. The only question of policy is whether the party's testimony should be disclosed to the adverse party. That question is easily answered. If there is a danger that the party's testimony would be unavailable at the trial by reason of death, illness or other circumstance, the examination before trial should be had. The determination whether to examine before trial the adverse party is not so lightly made. If he is examined and the result of the examination is unfavorable to the examining party, the party examined may read in evidence his own deposition even though he is available as a witness at the trial.[8] Many attorneys are justifiably reluctant so to preserve for the trial the testimony of the adverse party. They prefer to have the adverse party on the stand subject to cross-examination before the jury. In a case, therefore, in which a plaintiff has available witnesses by whom he can make out a prima facie case, he may forego the luxury of finding out in advance of the trial what the defendant's testimony will be. There are cases, however, in which the party has to take the risk. They are cases wherein the party cannot prove a prima facie case without the testimony of the adverse party. In such cases the adverse party must be examined before trial.

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[3] N.Y. Civil Practice Act §§ 288–312; N.Y. Rules of Civil Practice, Rules 120–133.

[4] N.Y. Civil Practice Act § 306.

[5] N.Y. Civil Practice Act, §§ 324–326; N.Y. Rules of Civil Practice, Rules 140–142.

[6] N.Y. Civil Practice Act § 322.

[7] N.Y. Civil Practice Act § 288; *Farmers Loan & Trust Co. v. Siefke,* 144 N.Y. 354 (1895).

[8] *General Ceramics Co. v. Schenley,* 262 App. Div. 528, 30 N.Y.S.2d 540 (1st Dept. 1941); *Masciarelli v. Delaware & Hudson R.R.,* 178 Misc. 458, 34 N.Y.S.2d 550 (Sup. Ct. 1942).

There has been in recent years a liberalization of New York rules in respect of examination before trial procedure. The movement for relaxation of their strictness dates from the adoption of the Federal Rules of Procedure. New York rules today are not as "wide open" as the Federal Rules but they do not indicate the opposition to the discovery process which existed before 1938.

In New York any party to an action in a court of record may cause his own testimony or that of any other party which is material and necessary in the prosecution or defense of the action to be taken before trial.[9] So also the testimony of the original owner of the claim which constitutes or from which arose the cause of action pleaded may be taken.[10] Corporate parties, unincorporated associations, partnerships and individuals doing business in their own or under an assumed name may be examined through officers, directors, agents or employees.[11] With one exception not important here, such parties cannot be examined through former employees.[12] The State or a municipal corporation as a party may be examined but only pursuant to order granted in the court's discretion.[13] It is to be noted that the only limitation upon the right of one party to examine the other is found in the requirement that the taking of the testimony be material and necessary. Such taking is not necessary as to matters admitted by the pleadings,[14] nor where a bill of particulars would suffice,[15] nor, as to the account, in an action for an accounting before the right to an accounting has been established,[16] unless the account and the right thereto are intertwined.[17] In matrimonial actions, an examination as to the husband's finances is ordinarily held unnecessary until the plaintiff establishes her right to final judgment.[18] The most serious limitation on the discovery process was found in the court imposed rule that examination by a party was permissible only to enable him to prove matters upon which he had the affirmative of the issue. That limitation has now been removed by Rules of Civil Practice, Rule 121-a. Today it is common practice for one party to serve a notice of examination and for the party to be examined to serve a notice that he will examine the first party at the time and place of, and immediately after the close of his examination.

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[9] N.Y. Civil Practice Act § 288.

[10] N.Y. Civil Practice Act § 288.

[11] N.Y. Civil Practice Act § 289.

[12] *McGowan v. Eastman,* 271 N.Y. 195, 2 N.E.2d 625, (1936).

Examination before trial of witnesses is not allowed, under New York rules, with the same freedom as the examination of parties. A reason must be shown for such examination. The reasons all relate to non-availability of the witness at the trial, or the distance of his residence therefrom, except that a witness may be examined if "other special circumstances render it proper that his deposition be taken."[19] The courts take a more liberal view in the construction of the quoted words than they formerly did and today it is frequently held that mere hostility on the part of the witness is sufficient to justify the taking of his deposition.[20]

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[13] N.Y. Court of Claims Act § 17; N.Y. Civil Practice Act § 292–a.

[14] *Burrows v. Magnetic Analysis Corp.,* 231 App. Div. 619, 248 N.Y. Supp. 365 (1st Dept. 1931).

[15] *Pfeifer v. McNally,* 163 N.Y. Supp. 577 (App. Term 1st Dept. 1917).

[16] *Solar Baking Powder Co. v. Royal Baking Powder Co.,* 128 App. Div. 550, 112 N.Y. Supp. 1013 (1st Dept. 1908).

[17] *Griffin v. Davis,* 99 App. Div. 65, 90 N.Y. Supp. 491 (3d Dept. 1904); *Stuckler v. Teitz,* 206 App. Div. 436, 201 N.Y. Supp. 394 (1st Dept. 1923).

[18] *Van Valkenburgh v. Van Valkenburgh,* 149 App. Div. 482, 133 N.Y. Supp. 942 (1st Dept. 1912) Cf. *Buckley v. Buckley,* 206 Misc. 981, 134 N.Y.S.2d 291 (Sup. Ct. 1954).

Most depositions are taken after issue is joined. There is statutory authority, however, for taking a deposition before action is commenced, or after action commenced to enable the party to frame a complaint, or during the trial of the cause.[21]

In personal injury actions the party against whom the claim is made may procure a physical examination of the person asserting the claim.[22] The courts have long divided on the question whether the person so examined is entitled to a copy of the examining physician's report.[23] And it has been held that such person was so entitled but on the condition that a copy of the report of his physician be furnished to the defendant.

In the ordinary case, a deposition may be taken by stipulation, by order, or by notice.[24] The procedure by notice is more expeditious and is available except in certain cases where an order is required by statute.[25] The notice is a ten day notice, which, in the case of examination of a party, may be followed by a five day notice for the examination of the party serving the first notice.[26] The notice states where, when, before whom and upon what matters the examination will be had.[27] In personal injury and death actions, the notice may state that the party will be examined on "all of the relevant facts and circumstances in connection with the accident, including negligence, contributory negligence, liability or damages." [28] This rule expressly eliminates the former technical contentions as to the form of the notice.

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[19] N.Y. Civil Practice Act § 288.

[20] *Lynch v. County of Erie,* 2 A.D.2d 651, 152 N.Y.S.2d 40 (4th Dept. 1956); *Malagoli v. Bernstein,* 1 A.D.2d 1042, 152 N.Y.S.2d 625 (2d Dept. 1956).

[21] N.Y. Civil Practice Act §§ 293, 295; *Teall v. Roser,* 206 App. Div. 371, 201 N.Y. Supp. 280 (4th Dept. 1923); *Lawffer v. Eastern Star Temple,* 210 App. Div. 619, 207 N.Y. Supp. 292 (4th Dept. 1924).

[22] N.Y. Civil Practice Act § 306.

[23] *Kelman v. Union R.R.,* 202 App. Div. 487, 195 N.Y. Supp. 313 (1st Dept. 1922); contra: *Horowitz v. Brooklyn & Queens Transit Corp.,* 171 Misc. 321, 12 N.Y.S.2d 41 (N.Y. City Ct. 1939).

[24] N.Y. Civil Practice Act § 290.

[25] N.Y. Civil Practice Act §§ 293, 295, 306; N.Y. Rules of Civil Practice, Rule 122.

The examination, if held within the state, generally proceeds orally question by question. There is a right of cross-examination.[29] There is no absolute right to an oral examination outside the state, and the court generally imposes a condition that the moving party pay the adverse party's expenses and counsel fee if an oral examination is allowed.[30] The normal procedure is to have examinations outside the state on written interrogatories.[31]

A discovery of books and papers may be had upon an examination before trial. The documents may be used to refresh the recollection of a witness or they may be introduced in evidence. The old distinctions in this respect, dependent upon whether the party moved by notice or order have now been eliminated.[32]

In a proper case a court of record may by order compel a general discovery and inspection of a book, document, or other paper, or of any article or property in the possession or under the control of a party.[33] Under this procedure one might obtain an inspection not only of books and papers but articles of property such as the frayed ends of a rope, a broken cable, a painter's torch, an electric drill, or any such equipment which might have caused an accident.[34] Tests may be made of articles or substances if the test will not result in complete destruction of the evidence.[35] Photographs, but not moving pictures, may be taken.[36]

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[26] N.Y. Rules of Civil Practice, Rule 121-a.

[27] N.Y. Civil Practice Act § 290.

[28] N.Y. Rules of Civil Practice, Rule 121-a.

[29] N.Y. Rules of Civil Practice, Rule 129-a.

[30] *Dayton v. Farmer,* 201 App. Div. 239, 194 N.Y. Supp. 620 (4th Dept. 1922).

[31] N.Y. Rules of Civil Practice, Rule 126.

[32] N.Y. Civil Practice Act § 296.

The final discovery device to be mentioned here is the statutory admissions procedure. After the pleadings are closed, and at least ten days before the trial, any party may request the adverse party to admit, for the purpose of the action only, the genuineness of specified documents, the correctness of photographs, or the truth of any matter of fact.[37] The matters are deemed admitted if the adverse party does not serve a sworn statement denying the matters, or stating why he cannot admit or deny them, or admitting them with qualification.[38] The sanction behind the statute is that, if the matters are not admitted, the court may order the adverse party to pay the cost of proving them, including reasonable attorney's fees, without regard to the outcome of the action.[39]

The discovery devices above mentioned serve a useful purpose. They sometimes furnish the only means by which a party can establish a cause of action or defense. They serve other ends as well. While there is much contention about the desirability of liberalizing rules authorizing their employment, it can be said that discovery serves the ends of justice by preventing surprise upon the trial, by narrowing the issues for trial, by protecting litigants against the hazard of loss of evidence through its destruction or through the memories of witnesses becoming dim. It is urged, too, and also denied that liberal discovery rules promote the settlement of many cases which would otherwise be burdening negligence calendars. If it be the fact that such settlements are promoted, the discovery process may aid in the settlement of one of the great social problems of the day.

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[33] N.Y. Civil Practice Act § 324; N.Y. Rules of Civil Practice, Rule 141.

[34] *Dugan v. American Transfer Co.,* 160 App. Div. 11, 145 N.Y. Supp. 31 (2d Dept. 1913); *Donoghue v. Collanan,* 152 App. Div. 162, 136 N.Y. Supp. 657 (1st Dept. 1912); *Chippona v. General Ry. Signal Co.,* 249 App. Div. 255, 292 N.Y. Supp. 393 (4th Dept. 1936); *Reiss v. Kirkman & Son,* 242 App. Div. 77, 273 N.Y. Supp. 7 (2d Dept. 1934).

[35] Cf. *Petruk v. South Ferry Realty Co.,* 2 A.D. 2d 533, 157 N.Y.S.2d 249 (2d Dept. 1956) (experts on both sides were present at the test).

[36] *Levine v. Pepsi Cola Metroplitan Bottling Co.,* 279 App. Div. 869, 110 N.Y.S.2d 98 (2d Dept. 1952).

[37] N.Y. Civil Practice Act § 322.

[38] N.Y. Civil Practice Act § 322.

[39] N.Y. Civil Practice Act § 322.

Preparation on the Law

The facts usually determine the results of actions in negligence, but it is seldom that a case is presented which does not present some legal issues. They may be procedural questions, problems of jurisdiction, the sufficiency of the evidence to present a question for the jury, or questions as to the admissibility of evidence. On the other hand, there may be questions of substantive law. On all these questions the attorney, if he is to be well prepared, must prepare himself by research. It isn't sufficient to raise the question at the trial; the lawyer must be prepared with a persuasive answer.

An attorney's preparation on the law commences as his client and other witnesses relate to him their accounts of the transaction out of which the action generates. At that time the legal questions will spring to mind. Despite the abolition of the forms of action, lawyers still think in terms of actions recognized by the law. As the facts are related, the lawyer will be thinking in terms of the essential elements of a cause of action. In most negligence actions the issues will be the existence or non-existence of negligence and contributory negligence and the fact of damage. In many, however, there will be issues of liability for defective premises or instrumentalities and many other legal issues will be presented. The lawyer must note the questions which occur to him and ascertain the answers prior to the time when he commences the action.

Some time prior to the trial, a trial memorandum should be prepared. It should contain a concise statement of the facts as the lawyer understands and expects to prove them. It should contain a persuasive argument on every question of substantive law which may be raised during the course of the trial. It is not sufficient to recite seriatim a succession of legal platitudes gleaned from digests or headnotes of cases. The argument should be set forth in such a manner that the judge, without recourse to a library, will be persuaded that the proposition contended for is the law. The legal proposition may be set forth in the form of a point, and such authorities as support it may be set forth by citation. There should follow, however, a brief statement of the facts of one or more of the principal cases relied upon, with a statement of the manner in which the question was presented to the court. Then should follow a statement of the decision rendered by the court, and an apt quotation from the opinion may be added. This should be done in respect of every legal question presented whether it be a question of substantive law, or of the sufficiency or the admissibility of evidence, or of any question of procedure. The questions should be foreseen and studied as a part of the proper preparation of the case for trial.

The trial memorandum above discussed is the memorandum on the law which is to be presented to the court. There is another memorandum which an attorney can profitably employ for his own use. It is a memorandum or note in the form of a script for the trial. The attorney will have carefully ascertained what evidence he must adduce to make out a prima facie case. His script will set forth the names of his witnesses and what he intends to prove by each. It will note the documentary evidence he intends to introduce and how he will lay the foundation for it. It will set forth all the items of damage and how they will be proved. It will contain a statement of the hypothetical question if an expert is going to be sworn. The memorandum will contain a statement of all the things the attorney expects to prove. If he follows it, there will be no accidental failure to prove the prima facie case which his client has.

We often hear of the trial attorney who goes from court to court trying cases which he has never heard about before the file is handed to him as a jury is being drawn. There may be such attorneys. Long familiarity with trial work may have given them a proficiency which makes less necessary diligent preparation. Even in such cases there has always been preparation even though it has been done by someone else. And who is to say that the trial would not have been more efficiently conducted if the attorney had prepared the case himself?

The Evaluation of a Personal Injury Action for Purposes of Settlement

LEONARD H. AMDURSKY *

In these days when the great bulk of litigation in our courts consists of personal injury actions, the importance of the proper evaluation of these actions for the purposes of settlement has become increasingly vital. This is especially true when one considers that over 95% of personal injury claims are settled either in the claim stage, or before or during trial.

Our court calendars throughout the country, especially in the more populated centers, are crowded, if not congested, by personal injury actions to the point where many forces are suggesting and even urging fundamental and far reaching changes in our system of the administration of justice in order to relieve congestion. We are repeatedly hearing arguments that juries be abolished and that these cases be heard and determined by a court alone for reasons of expediting the trial, or even that the courts themselves be abolished and be replaced by some sort of administrative board which would grant verdicts, either with or without regard to fault.

Since most of us of the so-called negligence bar have come to believe, through many years of experience, that the rights of the litigant and those of the public alike are best protected and served by the court and jury system, it is essential that settlement of the great bulk of this personal injury litigation be expeditiously arrived at so that court calendar congestion be relieved. Obviously, since there is

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neither time nor courts enough to try all these cases, the only solution to the congestion problem is disposition by settlement. Of course, the very presence of the court and jury ready to try the case if necessary, is a great stimulus to arriving at proper and fair settlement figures.

It has often been said that there are very few personal injury actions that cannot be settled if the lawyers in the case are sensible, responsible men who know the facts and law of the case so that the case may be properly evaluated from both sides.

The fundamental principle in determining the proper settlement value of a case is that the settlement figure must necessarily be based on a realistic appraisal of what the courts would probably do with the case and what the probable verdict of a jury would be. While the old maxim is that ''no one knows what a jury will do,'' and while the same case tried before four different juries could well result in four different verdicts, actually experience proves that jury verdicts are not nearly as unpredictable as fiction would lead us to believe. Juries find, in the vast majority of cases, fair and just verdicts well within the realm of reasonable anticipation. True, certain human frailties, sympathy, passion, prejudice, and other emotions enter into verdicts, but these, too, are well within the realm of predictability and can and must be considered in the evaluation of the case.

The basis of the settlement figure then is what the jury verdict area would probably be. At least, that must be the basic starting point. From the viewpoint of the plaintiff, this figure must be reduced for settlement purposes in consideration of the hazards involved in the lawsuit both as to getting a verdict and the amount thereof, and increased by the defendant in consideration of the same hazards. In other words, this jury verdict area figure, as separately appraised by each side, may then be modified downward by the plaintiff and upward by the defendant to the point where it becomes good judgment under all the facts and circumstances for the plaintiff to accept it and for the defendant to pay it. There is just enough uncertainty in the jury verdict under prospect to produce an area within which reasonable minds may compromise.

What then are the factors, whether approached from the point of view of the plaintiff or the defendant, in determining what a court and jury is likely to do with a case? There are, at least in theory, only two direct factors: first, liability and second, the nature and extent of damage and injury. There are, however, many indirect factors and, unfortunately for calculations, in many cases these indirect factors may well overshadow and determine the direct ones.

Liability, of course, is primary to recovery in any personal injury action and a realistic determination of liability must be made at the very outset. Liability, in theory, is something that ought to be simple to determine. It either ought to exist or not exist, but we know in practice it isn't that clear a proposition. More often it is one of those intangibles that lies in the grey area between black and white. Thus, the best that can be done is to carefully analyze the facts and the applicable law and attempt to determine the ''extent of liability,'' or, in other words, *the chances of recovery,* whether they be one hundred per cent, fifty per cent, none at all, or somewhere in between.

It goes without saying that before any personal injury action can be properly evaluated, the first and primary necessity is a complete investigation of the facts made as quickly after the accident as possible. Far too many lawyers upon being retained on the plaintiff's side of a negligence case, do little or nothing about it except wait for someone to bring them money. There is absolutely no substitute for an immediate interview with all witnesses to the accident, if possible at the scene of the accident. It is just as important that hostile witnesses be interviewed as well as friendly and disinterested ones. Certainly, it is equally important in order to properly evaluate a case to know its weaknesses as well as its strength, possibly more so. All motor vehicle and police reports and other available evidence should be obtained and reviewed. Having done the foregoing, a fair appraisal of the liability factor on the facts can be arrived at.

With the facts in hand, a search of the applicable law can be made in order to determine whether there is a cause of action as a matter of law. Even this may not be as simple as it sounds because in many fields of negligence law, except run-of-the-mill automobile accidents, the law is apt to be complicated and conflicting.

Having, however, determined whether or not there is a question of fact for a jury, there still remains the determination of what the chances are of recovering from the jury on the liability feature. This appraisal determines the ''extent of liability,'' and must be a realistic, not a wishful appraisal.

The second direct factor in the evaluation of the case is the nature and extent of injury and damages. This involves (a) the special damages, such as medical and hospital treatment incurred to date; future medical treatment, if any, and the dollar value of the lost time; (b) the actual injuries sustained; (c) the extent of disability from the injuries; (d) the pain and suffering involved; and (e) the degree of permanency, if any. These factors are further complicated when an aggrevation of a previous existing condition or the imposition of secondary trauma on an existing disease is involved. An appraisal of the injuries, the disability and the recovery must be carefully made, whether the case is being evaluated by the plaintiff or the defendant. One must determine how the injuries and recovery would impress a jury. Medical reports must be carefully analyzed and, if necessary, conferences with the examining physicians should be held in order to determine the validity of the plaintiff's claim of injury and disability. Certain objective injuries, involving fractures may sound worse to some juries than others of a more indefinite nature such as soft-part injuries to the back, whip-lash injuries of the neck, or post-concussion syndromes. In these latter conditions, examinations by a physician specializing in the particular nature of the injuries involved may many times be indicated to assist in an evaluation. Scars, of course, must be inspected personally as of the latest possible date.

In the evaluation of close cases of liability, the extent of injury may well be a determining factor of liability. In cases of close or no liability, a jury is much more apt to "no-cause" a plaintiff with little injury than one who is badly and permanently hurt. In such cases, the liability feature of the case may be easily overshadowed and determined by serious injuries which might capture the imagination and sympathy of a jury. Likewise, close liaiblity may cut down the value of injuries, as many juries return, in such cases, compromise verdicts; a sort of comparative negligence plan in result. Both the above possibilities must always be recognized in the realistic evaluation of close liability cases.

A preliminary appraisal of the value of the case from the injury standpoint can then be made subject to such adjustments upwards or downwards as may be necessary from the liability feature and the indirect factors peculiar to the individual case as may exist. All broken leg cases, even with good liability and the same relative amount of special damages, do not necessarily have the same value. After an appraisal of the liability and injuries involved, no case can be evaluated without a consideration of the elements peculiar to each case itself, which may greatly affect a jury verdict. I refer to these elements as indirect factors. These aspects generally are concerned with the age, appearance, status, and character of the parties as well as other factors such as religion, race, or color, which ought not enter into the picture, but often do. The whereabouts and activities of the parties just before the accident may well influence a verdict one way or the other. The age of the parties is of some importance. Juries frequently take into consideration youth or old age in determining the cause or effect of an accident. The ability of the plaintiff or the defendant to make a good appearance on the stand and his ability to take care of himself on cross-examination or the opposite, may well affect a verdict both on the liability and the damage aspects. I have heard good trial lawyers claim that they would rather have a favorably appearing client than favorable facts. The character of the defendant and his ability to pay become important. If the defendant is a large corporation, or railroad, bus, or trucking company, that fact may lead to a larger verdict, and hence, a greater value in the appraisal of the case. If the defendant is an individual, his ability to pay as a personality can become important. Was he a businessman driving a Cadillac or was he a laborer, mechanic or clerk driving an old model or modest car?

The status, financial or otherwise, of the plaintiff must be considered. Obviously, a broken leg is worth more when suffered by an industrious citizen than by a vagrant. And, of course, the figure of settlement may be dictated by the insurance limits involved, particularly where there is no financial responsibility beyond the policy.

The ability of opposing counsel and the reputation and ability of the attending doctors and medical experts in the case must be given consideration, as they may well affect a jury verdict. It is also true that jury verdicts vary in different counties on the same facts and for the same injuries. Cases in the United States District Court for the Southern District of New York or in metropolitan counties where large sums are frequently awarded, may be worth more than if these cases were pending in certain rural, upstate counties.

One must therefore determine whether the sum total of these indirect factors peculiar to the case will add or detract from the otherwise determined jury value and if so, how much.

All these factors of liability and injury, along with the peculiar factors applying to the particular case involved, must be given full consideration by both sides in the fixing of a realistic figure which, must be predicated on what a jury would probably do with the case.

Over the years, certain formulas in determining settlement figures have been used, such as three times special damages or five times special damages or three times special damages plus wages. Based on my experience, I believe them to be at best preliminary tools and of little or no value.

After giving proper consideration to all of the factors involved, both direct and indirect, a figure can be arrived at which one reasonaly believes is in line with what a jury might well do in the case and discounted or increased for settlement purposes. This does not mean that it is the first and last figure, but at least it is far more than a preliminary figure. It is what one has good cause to believe to be a realistic negotiating figure. It is my opinion that such a figure, or one close to it, should be given to the other side. I see no point in making ridiculously high demands or, on the other hand, making ludicrously low offers. This leads nowhere and often will end negotiations rather than promote them. It may be well to leave yourself a little room to turn around in, but foolish demands or foolish offers have no place in legitimate settlement negotiations.

Pre-trial conferences have, I believe, greatly assisted settlement negotiations because they do two things: (a) they provide a disinterested forum for negotiations and (b) they provide an independent appraisal of the case by the court. It seems to me that for the last few months, both the Bar and the Bench have shown a dissatisfaction with the practice of pre-trial conferences. I think this is a great mistake and believe that the use of pre-trial conferences should be greatly encouraged and expanded. They provide an independent and disinterested court opinion which in many instances brings about a settlement where compromise theretofor seemed impossible.

Whether settlement negotiations be conducted in the offices of the respective attorneys, before a judge at a pre-trial conference, or before a judge at a trial term before or during trial, settlements depend on reasonable men taking into consideration all the factors involved, fairly appraising their cause of action or defense, and negotiating on a realistic basis.

The future of negligence litigation may well depend on the fair and realistic evaluation of these actions on the part of the Bar leading to settlements in as many cases as possible, thereby reducing the calendar congestion in the courts. While it is most valuable to know how to try a case, it may be even more valuable to know how and when to arrive at a good settlement.

Trial of a Negligence Action

JOHN W. TABNER *

The successful trial of a negligence action will, of course, to a great extent depend not only on the courtroom tactics of counsel but on the preparation of counsel beforehand and the degree of knowledge which counsel may have of his case before the commencement of the trial.

Before any action is added to the Day Calendar, an attorney should be aware of all the various details which make up his own case and in addition, should also be aware of his opponent's case and possible proof. He should have available his pleadings and know their contents fully and completely. Depositions before trial should be outlined and notes made so that ready reference can be made thereto during the course of trial. Physicians and expert witnesses should be scheduled so that they may be called upon short notice and witnesses who cannot be relied upon to come to court must be subpoened and be readily available. In addition, counsel should interview personally all witnesses he will call.

The first step in the actual trial of an action is the selection of a jury. This phase should not be lightly undertaken, for upon the skill and knowledge of counsel in the selection of a jury may well depend the ultimate outcome of the trial. Counsel should obtain at the beginning of the term a jury list which sets forth the name, address and occupation of the jury panel for that month. It is advisable to check each individual juror in the City Directory so that a record may be made for each juror showing the locale in which the juror resides, his or her occupation, the occupation of the

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juror's family and financial status and general background. In the event that the case is not the first one on during the term, it is advisable to find out as to the disposition of prior cases and the names of jurors who have served on these actions.

The actual selection of the jury may be done in many different fashions. Each attorney prefers his own style, but in general, it must be conducted in an orderly fashion inquiring of the jury as to their personal ideals and beliefs and at the same time weighing the answers to counsel's questions. It is advisable to make the jurors feel that in the event they are seated, a high honor and privilege is being conferred on them in deeming them fair and impartial to sit as judges of the facts. In the opening remarks before selection of the jury, counsel should introduce himself to the jury and acquaint them with his position in the lawsuit as to which side he represents, whether he is the attorney of record and if he is trial counsel, explain the meaning of that term. Next he should endeavor to acquaint the members of the jury with the names of the parties, the date, time and place of the accident involved and a short description of the manner in which the accident occurred and the injuries which followed. The usual fashion is then to ask the jurors if they are acquainted with any of the attorneys for the parties or any members of their firm or if they are acquainted with any of the parties individually. It is also advisable to ask them if they are acquainted with the physicians likely to be called by the opposing side and in the event the names of witnesses are known, unless trial strategy dictates otherwise, to inquire as to their knowledge or friendship with such witnesses.

Often times a juror may be acquainted with one of the parties or attorneys and yet states that he is capable of rendering a fair and impartial judgment. This may be true but it would seem difficult to imagine that there would not be at least some unconscious disadvantage in accepting such a juror. At this point it is often advisable to pursue the matter with the jurors and by general questioning, point out and indicate to them the responsibility they are assuming and the possible embarrassment with which they may be confronted. It is advisable as well to be very careful in the acceptance of a juror who has been treated by a physician who will be called by the opposing side, for this juror may well give greater weight to the medical testimony of his own personal physician than he would to that of some other doctor. Counsel should inquire as to various circumstances regarding the jurors. Counsel for plaintiff will be interested in whether or not the juror has ever been a defendant in a personal injury action. The reverse is naturally true of counsel for defense. It is also wise to ascertain whether or not the jurors are operators of automobiles, or in premises liability cases, if they are owners of real property, businessmen, businesswomen or related to businessmen or businesswomen.

The jurors should be queried as to their particular reaction to personal injury causes of action, will they have any reluctance to bring in a verdict for plaintiff, will they be willing to give a sum in dollars and cents for pain and suffering, disability, lost wages, hospital and doctors bills. Will they give due consideration to the defense of the defendant, will they keep an open mind to all testimony which has been submitted to them?

Naturally most of the questions can be asked collectively. In our present day courts where jurors are shuttled from part to part and chosen as a member of one jury panel after another, they often times tire and become irritated in the event counsel may unduly prolong their examination. It is advisable, however, to ask of the jurors individually at least several questions, perhaps relating to their employment, or to their viewpoint and ideas regarding personal injury actions, so that an opportunity is presented to engage in an individual conversation with each juror. From this individual conversation, counsel will most likely be able to obtain at least some insight into the disposition of the person. Lastly, it is often advisable to ask the jurors whether or not they would prefer not to sit on the jury for the trial of the particular action and not request the reason. If they ask not to sit, counsel for both sides will most likely excuse them by consent since neither attorney will be desirous of being placed in the position of forcing someone to serve on the jury panel.

Special attention should be given to the insurance question so that it is asked in the proper fashion specified by statute and so that the jurors collectively are aware as to just what information you are seeking. In the event that some members of the jury panel are within the grounds specified by the insurance question in section 452 of the Civil Practice Act, and will not for that reason excuse themselves, a challenge for cause may be made which will be upheld and a peremptory challenge saved. After counsel has completed examining the jury, he should be seated, examine his notes upon the jury panel made at a prior time and review the notes made during the course of the examination. In some counties, it is the practice for each counsel at the conclusion of their particular examination, to exercise their peremptory challenges; in other counties, it is the practice for all counsel to complete the examination before challenges are made. When counsel is trying in a strange county, he should, of course, familiarize himself with the local practice in this regard. In a supreme court action, each side has six peremptory challenges. It is always advisable not to exercise the full six unless that is absolutely necessary, for once the six peremptory challenges have been used, counsel is completely at the mercy of the court and while challenges for cause will usually be sustained, counsel is assuming a great risk in such a challenge when he has no peremptory challenges remaining. In the event his challenge is rejected, he is then confronted with a situation where one of the members of the jury whom he is seeking to persuade as to the justice of his case, has already been informed that counsel does not deem him worthy to sit. Caution should be particularly observed in the United States District Court where only three challenges are permitted.

It is also the practice in many counties at the present time to seat two alternate jurors. The alternates should be examined with the same care given to the examination of the jurors for the alternates may well serve on the trial due to the illness of another juror or because of some other set of circumstances. Counsel should remember that regardless of how many peremptory challenges have been exercised in the selection of the jury, he has only one peremptory challenge in relation to the selection of the alternate jurors.

After selection of the jury, it is the duty of counsel to open the case. It is the custom and practice of some men to attempt a summation during the opening statement. This is done with the thought that it gives the party an advantage in having two summations rather than one. This practice, certainly not the accepted and approved one in our courts, should not be followed. It is the belief of this writer that it may result in a disadvantage to counsel. It is generally advisable in opening to make the statement in a fashion resembling a talk to the jury concerning just what counsel intends to prove outlining for the plaintiff the liability phases of the action and the injuries as well. Counsel for plaintiff should keep in mind the fact that he must state a prima facie cause of action in his opening statement or run the risk of a dismissal. Such instances are rare and the opening statement must be taken down, which is not the usual practice, but counsel should always have this matter before him so that he is not placed in an embarrassing position. Counsel for defense generally will make a general opening statement with the usual request to the jury to keep an open mind and hear all the testimony or he may go into detail and outline the proof which he intends to show. Individual cases will naturally have to dictate the approach to be taken but it is advisable not to make the opening statement for either side too long or too laborious for it will detract from the testimony of the witnesses and the summation of counsel.

The order of proof to be submitted is a matter upon which attorneys differ greatly. It is advisable to attempt to start the case with a strong witness firmly fixing in the jury's mind the merit of counsel's particular side. Weak witnesses and witnesses of less importance, who are nevertheless necessary, should be placed in inconspicuous spots during the course of the day, particularly shortly before or after noon recess. It is advisable to always attempt to begin a day and to end a day with a strong favorable witness.

Counsel must throughout the entire trial of the action be evaluating his particular position and his trial strategy. Often times there may be doubt in an attorney's mind as to whether or not a particular witness should or should not be called. The trial may be begun with the idea in mind that a certain witness is indispensable and must be called. Subsequent developments may prove that such a witness is unnecessary. As a general rule, it is advisable that witnesses who are unnecessary, and are only repeating testimony given at a prior time, not be called, for to do so will only expose them to the cross examination of opposing counsel.

It is a great temptation in examining witnesses to go on at great length and attempt to put into the record every last scrap of testimony to be obtained from a particular witness. Counsel should be cautious in this regard. Prior to placing any witness on the stand, counsel should fully discuss the case with him, prepare him fully and completely, including the old stock questions relating to discussion of the case with counsel and witness fees. While many of these matters may seem elementary to attorneys, the particular witness most likely has not testified before and is unaware of these matters.

The motto has often been repeated that it is far better to omit cross-examination than to conduct an unnecessary cross-examination. It is the usual layman's opinion that all odds are in favor of the cross-examining counsel. Many trial attorneys of experience can well appreciate the fact that in most instances, cross-examining counsel is actually under a much greater strain than the witness. Cross-examination should be prepared as well as possible before hand and during the course of trial. It should not consist of a repetition of the witness's direct examination. Why and how questions should be completely shunned and in the event that counsel can think of no manner or way in which he may assist his own proof or detract from his opponent's case, he should not cross-examine.

Counsel should be always alert during cross-examination of his own witnesses and direct examination of opponent's witnesses for possible objections. Objections should be made immediately when any particular matter is raised for in the event that the objection is made later, it may not be sustained by the court and if it is sustained by the court, the damage will have already been completed. It is also not advisable for counsel to attempt to argue the ruling of the court in relation to an objection. Such conduct will only force the court to become impatient and abrupt in its remarks and will often times convey to the jury the impression that counsel is not aware of the proper courtroom procedure and tactics. It is no longer necessary for counsel to except to the ruling of the court in regard to objections to questions and answers since an exception is automatically given by the CIVIL PRACTICE ACT at the present time. At the close of the plaintiff's case, it is the customary practice and good procedure for the attorney for the defense to move to dismiss the plaintiff's complaint on the ground that the cause of action has not been proven. Generally this motion is denied but it is preserved in the record for appeal in the event appeal may be taken. It is also the practice and customary procedure for counsel for defense at the close of the entire case to move again for a dismissal of plaintiff's complaint, which motion is generally denied. In all matters, counsel should customarily be alert to preserve and protect the record in the event grounds for a mistrial are presented. In the event improper testimony has been given, he should move to strike it, or if testimony has been accepted conditioned upon the proof of certain facts at a later time, which condition is not fulfilled, counsel should be alert and make a motion to strike this testimony.

After the conclusion of proof, it is then the duty of counsel to sum up to the jury. Summation is in reverse order to the opening statement, defense counsel having the first opportunity to address the jury and plaintiff's counsel concluding. Summation should be a conclusion to the action and in it, counsel should seek to demonstrate to the jury the value and merit of his action. This is the point where counsel is permitted the greatest latitude with the jury. Counsel may wish to emphasize points to the jury by means of his voice, gestures and various other ways. It is advisable, however, not to seek to put on a show for the jury, but to outline to them the proof which has been given. It is also advisable to illustrate to the jury the manner in which the opposite side has failed to sustain its burden. Comment upon testimony is permitted and counsel may well review the witnesses for the various sides. It is permissible, of course, to discuss damages with the jury and to request them to either refuse to award a sum, if that be counsel's position, or to be reasonable in their judgment. In short, counsel in this particular period, attempts by means of his speaking ability to sway the jurors to his particular side.

Courtesy requires that no objections be made during summation unless opposing counsel has abused the privileges extended during summation. Even if counsel attempts to go beyond the reasonable and legitimate points of summation, it is usually advisable to refrain from objection at the particular time and to then address the objections to the court after summation has been concluded.

After summation, it is then the duty and obligation of the court to charge the jury, during which time the court may comment on the facts or the damages and instruct the jury as to the law applicable to the particular action. No objection or exception to the charge should be made during the court's charge. Any exceptions or requests must be held until the court has completed. In relation to requests to charge, good practice dictates that they should be submitted in writing to the court prior to summation. This will give the judge an opportunity to examine the requests, do research if necessary and to arrive at his conclusion. In the event that the requests are not permitted by the court, counsel should state them in any event and upon their denial, place an exception in the record thus preserving the matter for appeal. Trial strategy may some times dictate that a request which will be denied not to be made since such a refusal may influence the jury in its deliberations. Counsel should also at this time except to those portions of the judge's charge which he deems improper, for if no exception is made, the ground is not preserved for appeal.

After the jury has completed its deliberations and returns to the box to announce the verdict, it is customary for the clerk to call off the names of the jurors and then ask them for their verdict, the verdict being given either by the foreman or a juror who has been chosen by the other jurors to announce the verdict. Counsel for either side then has the right to ask that the jury be polled and that each juror announce his or her individual verdict. This practice is advisable for counsel who has represented the losing side since occasionally he will find that ten of the jurors have not agreed with the particular verdict. The jury must then retire again to deliberate. It is also advisable, for counsel will then be aware as to just what jurors supported his case in this particular action. After the jury verdict has been announced and the jury polled, counsel for the losing side should at that time make a motion to have the verdict set aside upon the various grounds enumerated in the CIVIL PRACTICE ACT, thus preserving for the record counsel's objection and motion. In the event the court has reserved on certain motions during the course of the trial, it is then the custom to rule upon these motions. Counsel should be alert to protect the record by exceptions to the court ruling on the motions.

The successful trial of a negligence action actually requires a conscientious, hard-working, enthusiastic attorney who has completely prepared his case, and who during the course of the trial attempts in every way possible to present to the jury his client's cause of action or defense in the most favorable light, keeping in mind at all times the ethics and traditions of the courts and the legal profession.

Evidentiary Consideration in the Trial of Negligence Actions

ROBERT C. WINCHELL *

I. Introduction

Having agreed to participate in a planned symposium, the thought occurred to me that I should determine exactly what a symposium is. You can imagine my relief when, looking up the definition in the dictionary, I found that the word is Greek in origin and means discussion, sometimes with music, after food and drink. To the uninitiated, the word symposium is quite awe-inspiring. But, when the word is considered in its true meaning, that is, a discussion had over the cup, one cannot help but feel that such a discussion should be more simple, entertaining perhaps, rather than profound. It is not my purpose here to overburden the mind of the reader with a lengthy dissertation or to present a scholarly text supplemented by unwieldy footnotes and citations. The library shelves abound in countless volumes of this type, carefully prepared and exhaustively presented by experts in the field of legal writing. Wherever it seemed appropriate, I have supported my opinion with practical examples from my own experience.

A cursory reading of the topics assigned to others makes it obvious that there may be some overlapping and, perhaps, double coverage of certain points. But this seems unavoidable, as the trial of a law suit, from the beginning to end, is one continuous drama in which the dialogue of the actors should follow in logical sequence so that a complete story or picture is presented to the jury. The evidentiary considerations on the trial of a negligence action are many and in-

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volved. The evidence, of course, which is to be presented to a jury should be sifted and sorted, the chaff removed and the unimportant details disregarded. In the final analysis, we are striving for the production of a clear picture made up of broad, obvious strokes which can be easily seen and understood by the average juror. The picture to be presented is not the kind that requires proximity or strong lighting in order to discern the detail. Rather, it should be a portrait that projects itself from the gallery wall and presents no ambiguity in the observer's mind.

II. Direct and Cross-Examination—Plaintiff's and Defendant's Approach

By far, the largest percentage of cases presented to the trial jury are based on negligence. The average person spends a great many of his waking hours either as a pedestrian, or the operator or passenger of an automobile. This, accounts for a great bulk of the negligence actions. Ultimately, the evidentiary considerations in such actions arise out of the acts or failure to act as the average prudent person would under similar circumstances. Seldom is there complete agreement on the part of the witnesses as to what actually happened. During direct testimony, both plaintiff and defendant are interested in having a witness to the fact give a clear distinct statement of what he or she saw, or did, and of the physical facts surrounding the accident, affording the jury a clear understanding of the facts. Either plaintiff's or defendant's attorney, in going over the facts of an accident with a witness, should be careful to see that the witness's story is in proper sequence and that the important points are stated in simple language.

All witnesses are not equally adept in describing what they did or saw in concise language or proper sequence. Few witnesses have the particular gift of being able to use the proper word, phrase or illustration which would bring the jury, without a long recital on their part, a vivid picture of what they saw. Years ago, a case was tried in the courthouse of an upstate farm community involving local residents, who were passengers in a car which had collided with a transport truck constructed to carry four automobiles. The plaintiff's contention presented the question of whether the lights on the truck were improper in that the truck failed to have red lights upon its side and rear. For the defense, a man of small stature, past middle age, who was nicknamed ''Scotty,'' was placed upon the stand. When asked to describe the lights on the truck, he instinctively answered, ''it was lit up like a strawberry patch.'' It made little difference as to the definite location of the red lights on the truck. On subsequent cross-examination, the impression was indelibly in the minds of the jury. Another instance of this rare gift of description was exhibited in a trial involving liability as the result of a gas explosion demolishing plaintiff's residence. The Reverend Blackwell, a Negro minister, who was a neighbor of the plaintiff, and an eye witness, was questioned by counsel as to the effect of the explosion on other houses in the neighborhood as well as that of the plaintiff. In reply to a question designed to elicit a description of the explosion, the witness simply stated in a loud southern drawl, ''Pandemonium reigned.'' A more tedious or detailed explanation of the situation was uncalled for. No clearer word picture of the gravity of plaintiff's contention could be obtained.

There, of course, is a vast difference between the direct and cross-examination of a witness. The direct examination by plaintiff's counsel can be carefully prepared, and the witness is asked to cover the complete subject with the questions and answers proceeding in chronological order. Questions can be prepared, arranged, re-arranged, and due consideration given to how an effect on the jury can be accomplished. Cross-examination, on the other hand, presents an altogether different challenge. Defendant's side of the counsel table, sometimes referred to as the ''hot side," has to be prepared for every possible anticipated angle, and frequently some that are not. Much has been written on the art of cross-examination. Many illustrations have been given of the cross-examination in famous trials where the witness has been broken down and the case won. I will not take issue with the proposition that many a case has been won upon cross-examination. But it is likewise true that many more have been lost by reason of cross-examination. Usually little of the testimony of any witness on direct should be the subject of cross-examination, and any attempt to go over in detail all of the testimony of the witness with the thought that some inadequacy or inconsistent statement of fact can be refuted, is ineffective and only further impresses on the jurors' minds the favorable testimony given on direct.

It is difficult to describe how to cross-examine. Every successful cross-examiner has his own particular approach. The art of cross-examination is, in brief, a second sense. From your notes, you may have determined the vulnerable point in the testimony of the witness. You may have decided in your own mind whether the witness is a consummate liar or one subject to suggestion or thoroughly honest and will then proceed with your examination accordingly. A witness on cross-examination should never be examined in the same order that his story was given on direct, for that makes it easy for him. It is sometimes good judgment to pick some simple fact in the middle of his testimony, perhaps two or three facts, upon which you can question him and bring out a few additional points, whether they be important or not. In this way, you can achieve a reaction as to the witness's attitude upon cross-examination and, at the same time, put him somewhat at ease. Then question the witness, skipping from one subject to another, concerning the points upon which you feel you can develop additional testimony, which might change the jury's interpretation of the facts as already stated during direct examination.

One of the most common pitfalls of any cross-examiner is a tendency to carry his exam just one step too far. This deficiency plagues the experienced lawyer as well as the youthful law graduate. I recall one occasion which illustrates this point most precisely. The plaintiff complaining of serious personal injury had related her story to the jury in a most credible manner. To substantiate her claim, her personal physician, also a woman, was called to the stand and commenced to corroborate the plaintiff's contention emphasizing the treatments which were administered to the plaintiff. Upon cross-examination by the defense attorney, a prominent and capable trial counsel, the line of questioning was directed toward minimizing the extent and permanency of plaintiff's injuries, and proceeded substantially as follows:

> Q. Now, doctor, you stated that you have been treating your patient for several months in an effort to restore her to health. Isn't that so?
>
> A. Yes.
>
> Q. Do you feel these costly treatments are actually benefiting the plaintiff?
>
> A. Oh, yes. She is much better now.

Had counsel ended his examination at this point, he would certainly have achieved his objective. But with a fervent desire to impress the point on the jury, he added one further question:

> Q. And so every day, in every way, your patient is getting better and better. Isn't that so?
>
> A. Oh yes! Better—but not well.

Whatever value the prior testimony had, was at once demolished by this final question.

Authorities unanimously agree that when the opposing party's witness has in no way damaged your case by his testimony any cross-examination would be ill-advised and merely affords the witness an opportunity to injure your cause. Similarly, when you have decided that a witness has told the whole truth, damaging though it may be, don't strengthen the opponent's case by allowing the witness to repeat the detrimental testimony on cross-examination. Lengthy and tedious cross-examination is of questionable value and should be avoided whenever possible. Always keep a definite objective in mind when conducting your cross-examination and frame all questions accordingly. Cross-examination is a double-edged sword, equally as fatal to the inept practitioner, as it is powerful and effective in the hands of the skilled.

III. Expert Witness

The expert witness plays an important role in any trial and is commonly used in negligence actions. The preliminary steps in the examination of an expert involve statements relevant to his qualifications, and when a question arises as to his being qualified, it is usually for the court to determine his competency to testify. Experts may testify to facts within their own knowledge and give opinions in relation to such facts. In other cases, and under certain circumstances, witnesses may testify as experts in answer to hypothetical questions. Courts quite universally charge, in relation to the expert witness, that after having weighed and considered his testimony, the jury may disbelieve it when it is improbable or when it is discredited or disproved by other testimony in the case, or when any other circumstances appear which would affect the weight of the testimony. Obviously, no expert witness would ever testify if experts were always in agreement. The expert witness is used on the defense only when his testimony clearly disputes some important element in plaintiff's case.

The handling of the expert witness on the stand should be done with the utmost consideration and caution. The expert witness has usually arrived at his opinion after study of the subject and his knowledge of it, and his conclusions are usually such that he can sustain them upon cross-examination.

The vast majority of negligence actions involve the nature and extent of personal injury and, thus, the doctor becomes the most important expert witness. Medical experts quite frequently disagree. In the personal injury action, the medical expert is ordinarily the attending physician. The attending physician is, of course, much more apt to accept, at face value, the claims of pain and conditions enumerated by the patient than is the examining physician for the defense. In my observation, it has been the practice of defendants to obtain the services of those qualified physicians in various fields and specialties to examine and give their opinions. The doctor testifying for the defendant should be of the highest caliber and prominence, a physician whose integrity is unquestionable.

During the past twenty-five years, there has been a great change in the presentation of the medical aspect of the evidence in the personal injury action. This, of course, has followed the advancement in the care and treatment of the injured in a trend towards specialization in the medical profession. Only a few years ago, the general practitioner presumed to treat his patient without assistance even in operating upon the patient or the setting of broken bones. It was not unusual to find that the general practitioner had an x-ray machine in his office with which he treated his patients and took pictures. It soon became apparent that the average physician lacked the ability properly to diagnose the condition from x-rays or effectively treat it. It was not unusual to find serious disagreement among physicians in the interpretations of an x-ray, and so the conclusion that the taking and interpretation of x-ray pictures required specialized training and skill was inevitable. Practically all x-rays produced in court today are taken and interpreted by thoroughly trained and qualified specialists in roentgenology, who base their opinions upon a lifetime of study. I have seen the time when a neuro-surgeon interpreting an x-ray claimed there was no fracture when four general practitioners testifying in the case stated the x-ray evidenced a fracture. On another occasion, it was necessary, by agreement of the doctors, to call in a professor in the subject from a local medical school to determine whether the x-ray evidenced a fracture or not.

Efforts to impeach or discredit the medical expert on cross-examinations are usually fruitless and the accepted approach is to introduce your own medical testimony on direct examination and leave the question of credibility in the hands of the jury. In the trial of the ordinary negligence case today involving personal injuries, medical evidence is needed to dispute or rebut plaintiff's contention in a few cases only, for the skill and standing of the medical practitioner in general is high. One in high standing in his profession is not found in court giving his opinion with reasonable medical certainty, unless that opinion is in line with the accepted views of those in his profession engaged in study and research. It is not my intention to convey the impression that medical experts should never be cross-examined. The charlatan of the profession can often be discredited with a few well-planned questions during the cross-examination. Even the legitimate medical expert who is reasonably truthful and fairly sound in his conclusions can frequently be questioned on cross-examination as to the probable size of the fee he will receive for testifying, his training and experience in treating the particular injury involved and the frequency of his appearances in court as a witness. And, of course, the cross-examiner should never overlook the very important point that often the medical witness has never examined or treated the plaintiff in the case.

It is sometimes necessary to use the expert witness on the part of the defense when no expert witness is needed for the plaintiff's case. An example of this arose in an action against a private aviation concern which gave lessons in flying and furnished planes to their pupils. A student flyer on a solo flight was killed when, soon after take-off, the plane was seen to nose down, turn and crash to the ground. The action against the aviation company was based upon the findings that the accident was occasioned by the separation of the aileron control cable at the point where it was screwed onto the turn buckle. Three threads were stripped which indicated that the control cable had been turned into the turn buckle only three threads. It was claimed this caused the turn buckle and cable to separate when the student was using the aileron control during take-off. This situation, as testified to, and supported by the report of the Civil Aeronautics Board, was a damaging circumstance for the defendant. The picture changed materially, however, when the instructor of an institute of technology, in charge of the testing laboratories, gave the results of tests which he himself conducted revealing the force required to pull apart a cable from the threaded end of the turn buckle when it was inserted one, two and three turns. It was found that the force required to strip even one thread was many times the pull used in the ordinary operation of the aileron control in flight. Obviously, whether an expert is to be used in such cases, is determined by the results of his tests.

It is frequently urged that you can obtain an expert witness to testify to anything, and we often hear strange qualifications claimed by the witness, upon which he asserts his ability to pass upon matters in dispute as an expert. On one occasion, upon the trial of an action alleging negligence in the operation of an escalator in a department store, the witness claimed to be an expert by reason of the fact that he at one time had been engaged in the manufacture of conveyor belts and grain loaders and in that capacity, he had assisted in the designing of such equipment. He stated the principles involved in the escalator were the same or similar. Although his testimony was allowed and, in the opinion of the court, created a question of fact as to the operation of the passenger escalator, the verdict of the jury indicated that they gave no consideration either to his qualification or testimony.

There seems to be a present tendency upon the part of many plaintiffs' attorneys to feel that the use of expert testimony is of advantage in that that type of testimony has considerable weight with the jury. In determining whether or not the testimony of an expert witness should be used, careful consideration should be given to the risk involved, for if the testimony of the expert witness is upon an unimportant point of the case, and the witness fails to impress the jury, irreparable damage can be done. I am not attempting to minimize the importance that should be attached to the expert witness who can testify effectively upon an important point. However, an expert witness, when used to accentuate the obvious, or explain that which is within, or should be within, the common knowledge of the average juror, can be damaging. It may have the effect of giving the jury the impression that you are underrating their intelligence. A short time ago, this was impressed upon the writer. The case being tried was one involving serious injuries sustained by the guest of a hotel who slipped upon the corrugated rubber mat outside the entrance. Although the mat was under a marquee, the evidence established that there was a fine snow falling, which was swept under the marquee by the wind, causing an accumulation of snow on the mat. It was conceded that when plaintiff fell the mat was slippery and the evidence was that, although the hotel was in possession of salt, none was applied before the accident. The expert witness used by plaintiff's counsel was qualified by showing an Arts degree with major in chemistry, Bachelor of Science in chemical engineering, Master of Science in chemistry, and Doctor of Philosophy. He was referred to as "doctor," since his occupation at the time of trial was head of the chemistry department of a technical school. He was called to testify concerning the effect of weather upon the door mat. The door mat was carefully described as being of certain length and width with perforations and corrugations. The following questions and answers taken from the record exhibit what is meant by utilizing the expert witness to testify to the obvious, and also illustrate the approach of the cross-examiner in refuting the testimony.

Direct Examination:

Q. Can you give us an opinion as to the effect of the weather as I have just asked you in my question?

A. Yes.

Q. What is that opinion?

A. I would expect snow to accumulate in the perforations, some in the corrugations (of the mat) . . . Under foot traffic, I would expect that snow to become packed and partially melted . . . As the traffic continued, I would expect this snowy and icy material to build up, and where the traffic was heaviest, I would expect it to form an icy surface.

Q. Now, what about any run-off, in view of the condition of the mat—run-off of any snow or ice or water?

A. I would expect very little or no run-off.

Q. When you talked about traffic and people walking over this mat, tell us how that operates chemically or scientifically, doctor.

A. The weight of the person would produce a pressure on the snow or water, and it is a well known scientific principle that pressure will lower the freezing point of water; that would be the effect of people coming in from the street into the building, the traffic coming out of the building would have that effect, plus the effect of the warmth of the shoe surface itself. Both effects would tend to melt the snow which is accumulated. When the pressure of warmth would be removed, it would freeze.

Q. What effect does salt have on a frozen surface?

A. The addition of salt on ice or water lowers the freezing point.

Q. What happens if it were added to water?

A. You would have to reach a lower temperature to freeze that than you would ordinary water. It it were added to ice which was already formed, it would tend to melt the ice.

Cross-Examination:

Q. Doctor, you are hired here as an expert to answer questions propounded to you . . . and give your opinions, isn't that correct?

A. I was engaged . . . to examine the mat and give answers.

Q. And then (counsel) reads questions to you about the snow and the weather and then you say when snow is falling and a mat is there it will fall on the mat, isn't that true?

A. I don't recall saying that sir.

Q. . . . You say you are an expert on what weather does to materials; if snow falls on the ground and I step on it, I pack it down, I think you have testified?

A. I don't remember testifying as being an expert on anything, sir.

Q. If snow is falling on a mat, it would accumulate, wouldn't it?

A. I would expect so.

Q. And in the hypothetical question given you there were three inches of snow accumulated on the ground that day, isn't that true . . . ?

A. There was a statement about an accumulation of three inches of snow, yes.

Q. And if I step my foot on three inches of snow, I would pack it down, wouldn't I, that is just as simple as that?

A. That is correct.

Q. That would be true on the sidewalk, on the mat or on the road, wouldn't it?

A. Yes.

Q. Compressing snow, you say, causes it to melt to some extent, isn't that true?

A. Yes, sir.

Q. And when it melts to some extent on the sidewalk or on a mat or any other place, it does just what you expect it to do, melts somewhat when it is compressed?

A. To be partially melted, that is correct.

Q. Any place it would do that wouldn't it?

A. I expect so.

Q. Now, salt lowers the freezing point, you say, of water, is that correct?

A. Yes, sir.

Q. And with snow, if it continues to snow, snow dilutes the salt as it melts, wouldn't it?

A. As it melts, the water would dilute the salt mixture.

Q. And the salt would lose its effectiveness, wouldn't it?

A. It would be diminished.

Q. As long as it keeps snowing?

A. As long as water kept forming.

Q. Yes, and the water would be forming from the continual snow, wouldn't it?

A. It might . . . If the snow continued to fall and water continued to form by melting, that would tend to dilute any salt on the surface.

Q. Then, if it did, it would contribute to the freezing wouldn't it, because it would reduce the snow to water which would freeze?

A. In that sense it would.

The jury returned a verdict for the defendant.

IV. Handling of Witnesses

Just as each practitioner will have developed his own approach upon cross-examination, so will he have discovered his own formula for the successful handling of witnesses. With regard to direct examination, no real problem with the witness is presented. As I have stated previously, counsel has usually gone over in detail with the witness the testimony to be presented. Rather, it is the cross-examination which challenges the trial lawyer's formula for handling a witness and determines its success. Any capable attorney has invariably instructed his client and witnesses to listen carefully to the questions upon cross-examination, answer them to the best of their ability, and avoid becoming angry or entering into argument with the cross-examiner.

It is essential that the witness be treated with fairness. This is perhaps the most important and basic of all principles with relation to handling of witnesses. The jury is quick to sense that a witness is being treated unfairly or that questions are framed so as to confuse a disturbed witness. Brow beating a witness or losing your patience will merely arouse the sympathy of the jurors for the individual on the stand. I recall one very dramatic incident which took place in the courtroom involving a witness who was a man of high standing, the head of a large contracting firm, and one who had given the jury evidence of his being fair-minded and cooperative with the other attorneys who examined him. The examiner was an experienced and competent trial lawyer. The witness was a handsome, blue-eyed, gray-haired gentleman, with a name that indicated his Irish ancestry. The examination was technical and lengthy. The cross-examiner was well-prepared. In fact, the questions were the kind that are so often asked, susceptible of different interpretations because they do not include the entire picture. The witness had been bedeviled for an indeterminable time with such questions. It could plainly be observed that the color was mounting in the face of the witness and his hands were tightening on the arms of the chair, as the cross-examination progressed. The cross-examiner was attempting to establishd negligence on the part of the witness in laying a storm sewer and the questions related to the method used in back-filling a trench containing utility service pipes. The record contains this repartee which ensued between counsel and witness:

> Q. I thought you said each time you filled up to a service with earth and water, you stopped overnight; is that true?

A. Why...

Q. Answer me; is that true?

A. No.

Q. Just say so.

The witness (To Court): If I might ask instructions from the Court.

Q. Wait a minute.

The Witness: I am not talking to you now. (To Court) If you please, your Honor, a sewer is no building. For instance, in this building . . .

Counsel: I object to the witness giving some lecture here.

The Court: Just answer the questions, and if you can't, say you can't answer the question.

Q. If there is anything unfair, just say so!

A. It is all unfair. You don't have any appreciation of what you are trying to prove. There is no preparation as far as I can see.

Despite this set-back, counsel pressed on. The witness suddenly got to his feet, walked to a window and stood staring out with his back to the court, jury and counsel. What seemed like minutes of silence was probably only seconds, but it was at least enough time for the witness to count to ten. Then, with what appeared to be a slight smile on his face, he walked to the witness chair, seated himself, seemingly relaxed, and stated his readiness to continue. Not only the jury, but everyone in the courtroom was sympathetic with and impressed by the character of the witness. Counsel abandoned that type of examination and went on to another subject, no doubt, regretting that he had failed to properly judge the reaction of the witness.

V. Real Evidence

In recent years, real evidence has achieved greater significance in the trial of negligence actions. Associations of plaintiffs' counsel conduct frequent seminars during which they discuss the most effective way of presenting their cases to the jury, laying particular emphasis on the role played by demonstrative evidence in securing, what they consider, the adequate verdict. The text books define real evidence as the presentation of the object itself, to which testimony applies, for the personal observation of the court and jury. This is usually accomplished by the production of the object in the courtroom but, obviously, the situation may arise where the nature or dimensions of the object render this impossible. In such instances, the jury is taken to the scene or locality to view the object involved. In brief, the importance of real evidence is based on the time-honored adage, "a picture is worth a thousand words."

Where the situation affords the opportunity for utilizing real evidence, due consideration should be given to its use. It is the writer's personal opinion that often introduction of real evidence will be more harmful than helpful to your cause. For instance, the current trend among plaintiffs' attorneys is to exhibit in the courtroom an elaborate and multi-colored, life-sized plastic or rubber replica of the internal organs of the human body, to which the medical witness can refer during his testimony. To say the least, these objects are generally unappealing to the eye of the average juror. Such objects generally tend to lengthen the testimony of the witness to the point where it becomes most tedious and technical. It seems logical to me, therefore, that the real evidence in this situation would have an adverse effect upon the jury.

On the other hand, real evidence can be the pivot upon which the decision in the case turns. An example of this arose in a case wherein a school board was charged with negligence in failing to maintain a proper guard on a certain piece of machinery under its control. A student had been injured while operating the machine. Plaintiff's counsel brought the machine into the courtroom, and once it was discovered that the guard device was in perfect working order, defense counsel never once missed the opportunity of testing it before the jury's eyes as he walked past it. The verdict of the jury indicated that they were convinced that a more likely explanation for the accident was not an improper guard but rather the student's carelessness in failing to employ it.

Photographs taken at the scene of an accident have been a valuable assistance to the trial lawyer in proving his own case or rebutting his opponent's contention. The testimony of an alleged eye witness to an accident is discredited with dispatch when a photograph taken from the observation point described by the witness clearly demonstrates the impossibility of the witness having viewed the scene of the accident from that point, as he claims. The usefulness of photographs was vividly illustrated in one case where the plaintiff, a young woman, claimed she was unable to lift her arm as the result of the accident in which she was involved. Counsel for the defense produced a moving picture, taken only a few days before the trial commenced, showing the woman outside her residence with her arm stretched high above her head pointing to the roof of her house while giving a painter instructions. And, of course, the effectiveness of official police photographs and measurements, taken at the scene of an accident, is self-evident and needs no further elaboration.

Clearly then, real evidence frequently shortens the time of trial and leads to a proper determination of the facts by the jury. When it is felt that such a result can be achieved without prejudicing your cause, the use of real evidence is highly recommended.

VI. Conclusion

Undoubtedly, you have observed by now that I have taken great latitude in the subject assigned me. I have merely attempted to put together roughly my thoughts on the considerations in the presentation of the evidence in a negligence case. You have probably already come to the conclusion that I am very much convinced that forbearance is a watch word. Forbear from using anything that is not clear, concise and convincing. Forbear from pointless questioning in direct and cross-examination. Forbear from reiterating the obvious. If two and two make four, the jury needs no instruction in simple addition. It is also true if they are left to make the addition themselves, their result is much more convincing to them. In the final analysis, every practitioner must gain from his own experience, profit by his mistakes, and so conduct himself that the jury has no desire to defeat the client by reason of counsel's shortcomings.

Preparation and Argument of an Appeal

JOHN R. DAVISON *

The technique of preparing and arguing an appeal in a negligence case presents a unique and interesting challenge to all attorneys. This subject, with its multitude of ramifications has furnished the basis for numerous texts and in this short discussion of mine I shall attempt to touch only the general highlights and basic concepts which underlie this particular field of legal art. It is basic that when one states that he is concerned with a negligence action that the trial and appellate attorney immediately thinks of the broad term "facts." Therefore, we have the common saying that no negligence case has a twin and rarely has it a brother. The court of appeals as recently as June 25, 1958 has again stated "Each negligence case must, in turn, be solved 'pragmatically'."[1]

The appellate attorney works with that which has happened before. Namely, the "record" of a trial that has already been completed. This writer is of the firm conviction that one of the greatest factors in succesful appellate work is the initial, competent trial of the case, the preservation of all legal rights and the making of a detailed, accurate record to provide a strong foundation for an appeal if one should ever have to be taken. At this point I would like to note that some trial attorneys fail to recognize initially in their negligence action that an appeal will in due course be taken. In a plaintiff's action, if the liability sought to be imposed is great and meets with initial success, an appeal is felt to be in many instances compelled in like manner, the

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[1] *Ferrara v. Galluchio,* 5 N.Y.2d 16, 22, 152 N.E.2d 249, 253, 176 N.Y.S. 2d 996, 1000 (1958).

nature of the action seeking to impose liability on some particular defendant compels an appeal in the hope of forestalling the imposition of similar liability by other litigants. Two basic steps must initially be taken in every appeal. Counsel must first determine whether the party that he is representing has, first, the right to appeal and, secondly, which in most instances is the more difficult determination, whether an appeal has a reasonable legal basis for success. In relation to this first determination, that is, whether a party has a right to appeal, oversimplification of this technical legal question would be dangerous inasmuch as it involves the complex questions of finality, appealability and whether the proported appellant is in fact an aggrieved party. In a couched generalization it may be said that in the usual negligence case where a party has either been completely absolved of liability or upon whom liability has been ordered, an initial appeal will lie. The final determination of whether the right to appeal exists can only be made after a thorough examination of the rules of the court to which the appeal is sought to be taken and the relevant provisions of the CIVIL PRACTICE ACT in relation thereto. A helpful checklist dealing with appeals to all courts in this state may be found in Medina's Bostwick, 5th Edition. The more technical aspects of appeals to the court of appeals are explained in detail in Cohen and Karger: "The Powers of the New York Court of Appeals."

The second determination as to whether an appeal has a reasonable legal basis for success does not necessarily mean that the law requires a reversal. That, of course, is a enviable position for an appellant to be in. An appeal in such a case may be worthwhile even though a ruling in an earlier case may appear to militate against a reversal.

The law of negligence is mutable. The courts are changing rulings of long standing in relation to tort liability, and there have been many extensions in the twenty years since Chief Judge Crane stated: "When we apply the law as I have given it to the facts, we see that the accident is one of those unfortunate occurrences for which the law provides no remedy. There are many such.''[2] In that case jury verdicts in favor of the plaintiffs against the owner of a twenty-six year old theatre had been affirmed by the appellate division.[3] Plaintiffs had been injured, while seated in the theatre, by a person falling upon them from the mezzanine fifteen feet above as result of having been shoved or jostled by a crowd over a balustrade which was only thirty-two inches high. The court of appeals reversed and dismissed the complaints.

Another illustration of the point that an appeal may be warranted, although past rulings appear to be unfavorable, is the recent case of *Schuster v. The City of New York,* decided November 13, 1958.[4] In that case the court of appeals by a four to three decision reversed the dismissal of a complaint against a city for damages for the murder by an unknown assailant of one who had supplied information to the police which led to the arrest of a dangerous fugitive. Recovery was sought on the theory that the deceased had not received the police protection to which the circumstances entitled him. Yet, only ten years before, the court of appeals unanimously affirmed without opinion a ruling of the appellate division that ''a municipality is not liable for its failure to exercise a governmental function, such as to provide police or fire protection.''[5]

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[2] *De Salvo v. Stanley-Mack-Strand Corp.,* 281 N.Y. 333, 340, 23 N.E.2d 457, 459 (1939).

[3] *De Salvo v. Stanley-Mack-Strand Corp.,* 257 App. Div. 941, 13 N.Y.S. 2d 102 (1939).

[4] *Schuster v. City of New York,* — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1958).

[5] *Murrain v. Wilson Line,* 270 App. Div. 372, 375, 59 N.Y.S.2d 750, 753, (1946) *aff'd,* 296 N.Y. 845 (1947). See also, *Steitz v. City of Beacon,* 295 N.Y. 51 (1945); *Moch Co. v. Rensselaer Water Co.,* 247 N.Y. 160, 159 N.E. 896 (1928).

Another illustration of the point is *Bing v. Thunig*,[6] which overruled *Schloendorff v. New York Hosp.*,[7] wherein it was held that it was a settled rule that a hospital is not liable for the negligence of its physicians and nurses in the treatment of patients.

Still another illustration is *Woods v. Lancet*,[8] holding that an infant can recover for prenatal injuries tortiously inflicted and overruling, *Drobner v. Peters*,[9] and I have previously referred to the latest determination by the court of appeals (*Ferrara v. Galluchio*) [10] wherein a recovery of damages for mental disturbance brought on by spoken words was upheld.

These few cases, of many, clearly illustrate that the social consciousness of our communities is always changing. Acts which twenty or ten years ago did not constitute negligence may very well constitute negligence with its resulting liability today.

It is a credit to both our state bench and bar that these changes have found expression in our decisional law.

Having determined that there is a right to appeal and that there is a reasonable chance of success, the next thing to do is study the appeal provisions of the CIVIL PRACTICE ACT and of the RULES OF CIVIL PRACTICE (or if it is a case in the federal courts, of Title 28 of the UNITED STATES CODE and of the FEDERAL RULES OF CIVIL PROCEDURE) *and the rules of the court to which the appeal may be taken.*

This writer has found that if after studying any of the technical aspects of the right to appeal and the rules of the court to which the appeal is to be taken, that if some confusion should arise as to some procedural method to be adopted, that a discussion of the same with the clerk of the particular court to which the appeal is to be taken normally clears up such problem. The clerks of the particular courts in this state, with their specialized knowledge of the practice within their own court, always stand ready to aid any advocate in solving his particular procedural problem.

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[6] 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

[7] 211 N.Y. 125, 105 N.E. 92 (1914).

[8] 303 N.Y. 349, 102 N.E.2d 691 (1951).

[9] 232 N.Y. 220, 133 N.E. 567 (1921).

[10] 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

Now, you will be concerned with (1) the time to appeal, (2) the service of the notice, (3) the need for a stay, (4) the necessity for and the nature of an undertaking, (5) whether you must make a case and, if so, its contents and its settlement, (6) the contents of the record on appeal, (7) whether you must have more than one copy of record and the form in which it may be presented, i.e., printed, typed or otherwise reproduced, (8) the time within which the record and briefs should be filed, (9) the necessity for a note of issue and a notice of argument.

In relation to (2) above, it is interesting to note that an appeal may be instituted with relatively little time or financial burden. All that is initially required is the service upon the attorney for the adverse party and the filing in the office of the clerk with whom the judgment or order to be appealed from is entered, a written notice, identified by the caption and date of entry, that the appellant appeals from that particular judgment or order or from a specified part thereof. The notice is entitled in the court from which the appeal is taken. After this initial ministerial step is taken the prosecution and perfection of the appeal must follow. These latter two aspects of appellate advocacy are the real tests of one's legal ability.

You can save yourself time, and your client money and at the same time gain the respect and confidence of the court if you carefully prepare the record, eliminating everything not material to the question or questions to be presented on the appeal.

On July 1, 1957 a change was made as to the contents of the Statement under Rule 234 which the RULES OF CIVIL PRACTICE requires to be prefixed to the papers on appeal. The statement must give a brief description of the nature and object of the action or proceeding, the time it was commenced, the time the respective pleadings were served, the court and county in which the action or proceeding was brought, the names of the original parties in full and change therein. A duplicate copy of this statement must be filed with the clerk of the appellate division at the time the record on appeal is filed.

Exhibits need not be included in the record unless the judge so directs. The writer has found the inserting of photographic exhibits in the brief, where there is no rule against doing so, is helpful. A picture or series of pictures of the scene of an accident or of the nature and extent of property damage or personal inquiries can shorten a brief and at the same time say more than words. It is customary to include in the record a stipulation to the effect that the exhibits are omitted by consent but will be handed to the court on the argument and may be used by either party as if included in the record. Where appropriate, the record must include an order settling and directing the filing of the case. An opinion or an affidavit of no opinion must also be included. Finally, there must be included either a certification of the record by the clerk of the court in which it is filed or a stipulation or affidavit in lieu of certification.

If you represent the respondent, you are concerned with whether the appeal is timely and properly taken, whether you should cross-appeal, and the time allowed to do so, whether the record is complete and whether a motion should be made to dismiss the appeal.

Before the brief can be prepared, a review should be made of certain basic concepts dealing with appellate practice which, by the nature and posture of your position in an action, regulate the manner in which you must proceed. These determinative issues, of course, depend on the party that you represent, the appellant or respondent; whether that party was the plaintiff or the defendant, and the nature and type of the trial had, if any. Excluding the multiple defendant and three party action situation, the technique employed on the appeal in a negligence case varies in three general situations:

(1) The representation of a party in an action where the complaint has been dismissed upon the trial, or the record of a trial as a matter of law.

(2) The representation of a party where there has been a trial by jury.

(3) The representation of a party where there has been a trial by a court without a jury.

(1) In a situation where the complaint has been dismissed upon the trial, or the record of the trial, as a matter of law, by the next lower court, the main argument that can be made, for the appellant, is that a prima facie case was made out, and by the respondent, that no prima facie case was established by the proof.

(2) In a situation where there has been a judgment entered on a verdict following a trial by jury, the appellate division can order a new trial on the ground that the verdict is against the weight of evidence, and either the appellate division or the court of appeals may set the verdict aside and dismiss the complaint, as a matter of law, for failure to establish a prima facie case or freedom from contributory negligence, and both appellate courts may grant a new trial for errors of law. The distinctions and niceties between the absolute constitutional right to a jury trial and

the power of the courts to reduce or increase verdicts must be clearly understood.[11]

(3) In situations arising on appeal from a judgment rendered after a trial by the court without a jury, the appellate division has the same power as the trial court but care must be taken to see, that in exercising that power to determine the facts, the order is drawn in proper form.[12] Where new findings of fact have been made in the appellate division, the facts are open for decision by the court of appeals.

These above generalizations which are subject to some exceptions have been set forth merely to point up the fact that before an appellate brief can be written there must be a clear understanding of what disposition the appellate court can make of the issues sought to be reviewed. Once this has been determined the gravamen of one's brief must then be directed to the authority vested in this particular appellate court. For a more detailed discussion and history of this interesting phase of appellate practice, see ''Jurisdiction of the Court of Appeals,'' 2d Edition, B.N. Cardozo; Cohen & Karger, ''Powers of the New York Court of Appeals''; ''Claims Against the State of New York'', John R. Davison.

In the preparation of a brief, there are ground rules which apply, whether you represent the appellant or the respondent. The first is to read the rules of the court to which the appeal has been taken in respect to briefs and follow them. If you can not comply with them make a motion to be relieved of the necessity for so doing and show good cause therefor. The second is the marshalling of your facts. The writer has found that a summary of the facts in chronological order is a valuable aid in writing a brief. It insures indispensable familiarity with every fact in the record and facilitates appraisal of the important and unimportant facts. The third rule is to assess the relative weight of your points and to cite the authorities.

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[11] See *Herman v. U. S. Trust Co.,* 221 N.Y. 143, 116 N.E. 865 (1917); *Lamport v. Smedley,* 213 N.Y. 82, 106 N.E. 922 (1914); *O'Connor v. Papertsian,* 309 N.Y. 465, 131 N.E.2d 883, 148 N.Y.S.2d — (1956).

[12] *McLean v. McKinley,* 307 N.Y. 661, 120 N.E.2d 842 (1954); 307 N.Y. 920, 123 N.E.2d 572 (1954).

Upon completion of the brief the appellate attorney then makes preparation for his oral argument. Certain members of the bar with whom I have discussed this phase of the appellate process have viewed it as more or less a tolerated anachronism. I believe this view to be completely mistaken. While the briefs, of course, particularly where the litigation is a complicated one, must carry the greater burden to the court, the oral argument in all cases is still an effective tool of appellate advocacy. The oral argument is the means by which the bench receives its first and all important impression of the appeal. It is the only media offered in our appellate practice which provides the important oral interchange between the bench and the bar. Since oral argument is a personal art, only the most basic and general suggestions can be made in relation thereto. Common sense in the approach to it should be the rule. Each court limits the time of appellate arguments. It is the rare case that cannot be stated within the time limits set therefor. Naturalness, candor and forcefulness describe the attributes of the more successful appellate practitioners. Questioning from the bench in this state is employed on all levels of our appellate system. These questions should be met forthrightly and answered succinctly. In the answering of questions, however, I would recommend one element of caution. Never, if possible, generalize in answering the questions from the bench. This is particularly true in an appeal in a negligence action where counsel should strictly confine himself only to the facts in his own particular record.

On oral argument, it would be best to evaluate those issues of the appeal which counsel feels are really controlling and concentrate on them, leaving whatever subordinate issues there may be to the court's study of them from the briefs.

If these basic fundamentals of our appellate process are observed, I am of the firm conviction that all members of the bar will find an appellate experience both stimulating and successful.

Comments

A Re-Examination of Bridges v. California

On May 5, 1938, the Los Angeles Times published an editorial entitled "Probation for Gorillas?". The following appeared:

> It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their "duty" would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. The community needs the example of their assignment to the jute mill.[1]

For this and other articles published concerning the same subject, the Times was adjudged guilty of a contempt, which adjudication was thereupon appealed through the California state courts and untimately to the Supreme Court of the United States.[2] It was held by a divided court that the decisions of the California courts could not be upheld and that the conviction of the Times was brought about by an unpermissible exercise of state power. This opinion was decided 5 to 4, with Justice Frankfurter writing a blistering dissent. The press considered this case as a victory for free press, permitting severe criticism and threatened suggestion to a judge prior to announcing his decision.

Five years later the United States Supreme Court, in a similar contempt situation stated what it considers to be the law of the land which has resulted from *Bridges v. California:*

> The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires

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[1] Bridges v. California, 314 U.S. 252, 272, n 17 (1941).

[2] Bridges v. California, 314 U.S. 252 (1941).

> which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.[3]

Thus, for all practical purposes a judge's power to hold a party in contempt of court, when the acts constituting the contempt were committed at a distance from the court and such acts were the acts of the press, has vanished. Though such acts might "reasonably tend" to obstruct justice is not controlling, for in its place is substituted the "clear and present danger" rule.

It still was possible for state legislatures to vest in the courts of the state the authority to punish such publications by use of the contempt power.[4] The case of *Pennekampt v. Florida*[5] quickly closed the door to such procedure on the part of the legislature and put the "clear and present danger" rule clearly in effect.

This discussion is limited to press comment on pending litigation before a judge with a purpose of re-examining *Bridges v. California.* No distinction is to be made between pending litigation before a judge and litigation before a jury, as any reasons given in support of the proposition that the *Bridges* case was improperly decided should also apply to pending litigation with a jury as a factor. Indeed, as will later be shown, the arguments in favor of *Bridges v. California* seem to be more persuasive when a judge alone is involved, and if it can be successfully asserted that the rule of that case is too extreme, it would follow that litigation before a jury also must fall along with it.

It cannot be assumed however, that the precise question as to whether and in what instances the First Amendment prohibits courts from restricting the press from commenting on pending litigation and interfering with the right of fair trial is completely settled.[6] This is clearly shown by the United States Supreme Court's refusal to grant certiorari in the *Baltimore Radio Show* case.[7] Here the Maryland Court of Appeals had reversed the contempt convictions of certain broadcasting companies in Maryland for their handling of a highly publicized murder trial in the City of Baltimore on the ground that their convictions violated freedom of speech and press under the Fourteenth Amendment. In its refusal, the Court stated:

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[3] Craig v. Harney, 331 U.S. 367, 376 (1947).

[4] See Hanson, *The Two Bulwarks of Liberty: A Free Press and an Independent Judiciary,* 41 A.B.A.J. 217 (1956).

[5] 328 U.S. 331 (1946).

> It becomes necessary to say that denial of this petition carries no support whatever for concluding that either the majority or the dissent in the court below correctly interpreted the scope of our decisions in Bridges v. California, 314 U.S. 252; Pennekampt v. Florida, 328 U.S. 331; and Craig v. Harney, 331 U.S. 367. It does not carry any implication that either, or neither, opinion below correctly applied those decisions to the facts in the case at bar.[8]

The convictions for contempt in this case were based solely on the effects the broadcasts had upon the public, from which the jury would be selected and not upon any effect the broadcasts may have had on the judge.[9] This was properly so, as any application of the ''clear and present danger'' rule in these cases to include a judge becomes, for all practical purposes, impossible. It is the purpose of this article to develop the proposition that the ''clear and present danger'' rule as made applicable by *Bridges v. California* with its requirements of extreme peril and imminent danger is unworkable in cases involving press comment on pending litigation.

One cannot deny that the immediate result of the *Bridges* case has been to sanction practices in this field deplored by most trial attorneys. Even in its narrowest construction it permits comment which was unheard of prior to 1941 and which would be considered anathema in present day England. Although the following quotations perhaps apply primarily to jury trials, they serve to show the present day practice which trial attorneys find deploring. One such writer states the present situation thusly:

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[6] Forer, *A Free Press and a Fair Trial,* 39 A.B.A.J. 800 (1953).

[7] Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950).

[8] *Id* at 919.

[9] See Maryland v. Baltimore Radio Show Inc., 193 Md. 300, 67 A.2d 497 (1949).

> Now through this stockade which we have patiently built around the jury, the press has built pipe lines. Through these they feed to the jury . . . information which is not admissible in evidence. . . .
>
> In addition, the jury gets opinions via the press of amateur detectives, of editors, and through the inquiring reporter who questions the man on the street. . . .
>
> Finally, the jury is . . . made to feel in some cases that a particular verdict will result in their being highly regarded by their neighbors, whereas a contrary verdict will subject them to criticism.[10]

Certainly, it can be seen from this that just in the realm of testimony alone, by making predictions of forthcoming testimony, by the printing of testimony which has been stricken out, and by describing testimony with such words as shaky or dangerous, an attempt, well calculated to affect a jury, is made.[11] There is no other reasonable purpose to attribute to such publications.

Nor is the practicing bar the only organ to take cognizance of this situation. Consider the statements of the Supreme Court in *Sheppard v. Florida*:[12]

> But prejudicial influences outside the courtroom, becoming all to typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated.[13]

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[10] 1953 *Bar Bull., N.Y. County Lawyers Association* 15.

[11] Otterburg, *Fair Trial and Free Press,* 27 N.Y.S. B. A. J. 103 (1953).

[12] 341 U.S. 50 (1951).

[13] *Id* at 51.

Thus there is, at least on the part of two Justices of the Supreme Court [Jackson and Frankfurter, JJ.] a realization of the intolerable results of *Bridges v. California.*

No one can deny to citizens their right to criticize their government and its agencies, nor can it be properly asserted that court should be immune to such criticism.[14] Hence publications which criticize a judge, or the whole judicial system for that matter, are not improper for they fall within the above proposition. Should a particular judge, in the eyes of a newpaper, fail to come up to the standards which one should reasonably expect to find among the judiciary, there is no doubt but that the newspaper has a right to print so. Should it also feel that the wisdom of a judge was not what it should have been in a particular case, it has the right to say so. Should the press feel that the administration of justice in a particular area is being hampered by the existing judicial system the right to criticize that system exists as does the right to suggest its change. All these things are so not because one can assert that there exists in their use no danger to a fair trial, but because they fall within the area of proper press comment. Any citizen has the exact same right. It is only when the press goes outside these limits and does acts which might reasonably tend to interfere with justice is issue taken. There is an inherent fallacy in allowing someone to do an improper thing beneath the veil of freedom of the press and the First and Fourteenth Amendments.

Prior to *Bridges v. California* the rule governing newspaper publications was asserted in *Paterson v. Colorado*[15] in the following manner:

> Judges generally, perhaps, are less apprehensive that publications impugning their own reasoning or motives will interfere with their administration of the law. But if a court regards, as it may, a publication concerning a

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[14] See Konegsberg v. State Bar of California, 353 U.S. 252 (1957).

[15] 205 U.S. 454 (1907).

> matter of law pending before it, as tending toward such an interference, it may punish it as in the instance put.[16]

Although this was the law which existed up until the *Bridges* decision it would be erroneous to conclude that all were satisfied with it. This is plainly borne out by Justice Holmes himself, who wrote the *Paterson* opinion, when it is compared with his dissent some 11 years later in the *Toledo Newspaper Co.* case.[17] Justice Holmes in the latter case shifted his emphasis from the tendency of the publication to interfere with justice to the effect the publication should have had upon the judge. Thus, he stated:

> The order for the information recites that from time to time sundry numbers of the paper have come to the attention of the judge as a daily reader of it, and I will assume, from that and the opinion, that he read them as they came out. . . . But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty.[18]

This was of extreme importance, for the more liberal the bounds in which the press was to be contained became, the more severe the publication had to be before one could show that it had any effect on a judge. Indeed, with the emphasis so placed, a judge must manifest courage of the highest order to dare cite a publication for contempt, for no matter what may be the severity of the article, there is his admission that he was so affected by it that an imminent and impending peril to the proper administration of justice was brought about.

The law of England as it exists today is more closely akin to the law prior to *Bridges v. California* in this country. In any consideration of the laws existing in England, however, it should be stated at the outset, particularly in this field, that there is no presumption of its applicability over here. It is quite obvious that one of the purposes of the Constitution is to insure in our country the existence of constitutional guarantees which may or may not be present over there. There is, however, an inherent similarity in our court structure and powers and it is not infrequent that courts here look to English courts for precedents. Also, one can gain from the existence of a rule opposed to ours a moral of very important consequences, for the dire results from which those who advocate the *Bridges* case contend that we are saved, have not yet come about in England, and indeed, no one is asserting that the press in England is not free because of this. Justice Frankfurter has included in an appendix to his opinion in the *Baltimore Radio Show* case [19] a number of English decisions concerning contempt of court for comments prejudicial to the fair administration of criminal justice.

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[16] *Id* at 462–463.

[17] Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

[18] *Id* at 424.

In England, emphasis is placed primarily upon the acts themselves and their reasonable tendency, not on their effect.[20] Hence, an act done which might lower a judge's authority or interfere with the due course of justice is a contempt. Therefore, should a publication tend to prejudice the public for or against a party, a contempt could be made out. It is felt that such a publication could affect witnesses, inducing them to come forward with evidence on one side or to restrain themselves should their testimony run contra to the feelings the publication has fostered amongst the public. Naturally, such a situation is not always easy to make out, and the interference here suggested would have to be within the realm of probability. Halsbury states the law thusly:

> The question in all cases of comment on pending proceedings is not whether the publication does interfere, but

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[19] Maryland v. Baltimore Radio Show, Inc., *Supra* note 10, at 921.

[20] See, HALSBURY, LAWS OF ENGLAND, Vol. 8 P. P. 6 to 11.

> whether it tends to interfere with the due course of justice.[21]

A good example of the actual workings of the English rule is shown by *Rex v. Clark.*[22] The newspaper in question had published the confession of one Crippen in which he admitted the killing of his wife, although denying the act was murder. At the time it was published Crippen was being held in custody but had not yet been formally charged. It was held to amount to a contempt of court, stating:

> The Court could not be blind to the fact that newspapers were frequently owned by wealthy people who would take their chance and cheerfully pay any fines that might be inflicted for the sake of the advertisement.[23]

The court used this to show why imprisonment is the primary means of punishment in such cases, although it was not used here because of the publishers' apology. The court was quick to point out that this was an apology running to the public and not to the court, as it had no feeling in the matter.[24] There seems to be a realization in England at least that the press can be guided by monetary motives in an interest to sell newspapers and this fact should not be obscured by the phraselogy of freedom of the press.

An analysis shall now be attempted of the arguments put forth on behalf of the press in this controversy. Any attempt to so do must carry with it the admission that it is by no means complete. Many positions overlap making it difficult to draw distinctions, others negate each other by the assumption of contradictory premises. This latter point is extremely important, for whatever is assumed in the beginning will oftentimes dictate the conclusions to be followed.

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[21] *Id* at 9.

[22] 27 T.L.R. 32 (K.B. 1910).

[23] *Id* at 35.

[24] *Ibid.*

One position of the press in this controversy is put forth in a recent bar association journal.[25] In substance it asserts that publishers have a greater obligation than the dissemination of news. They have the obligation of preserving for the people their right to have the press free from all restraints no matter where such restraints may spring. This is an attempt to place the publishers in the position of trustees, guarding and protecting freedom of the press; and is undoubtedly too great a concession. The press can have no greater freedom than any individual can have, no more and no less, and it must be subject to the same restraints.[26] No rights can be placed in the hands of others, as trustees, for the benefit of the public, because any person or organization is, in a sense, part of the public and stands in no greater relation to it. Such person or organization is subject to equal restraint when it trespasses on the rights of others, and is not entitled, nor should it expect, any preferential treatment.

This is by no means the only argument favoring the press in this controversy, although most other arguments present practical means by which a court can avoid results, and hence advocate the status quo. It must be pointed out at the outset of any analysis of these arguments that they are put forth not by the representatives of the press, as they, in the main, admit that the press can be unfair and can assert influence and is so doing. The attitude of the press, as has been pointed out, is more doctrinal.

Generally, these arguments start out by excluding any proceeding, although pending, before a judge, for it must be taken for granted that a judge will in no way be affected by something as far removed as a newspaper publication.[27]

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[25] Hanson, *Supra* note 4.

[26] See Cullinan, *The Rights of Newspapers,* 41 A.B.A.J. 1020 (1956).

[27] See 59 Yale L.J. 534 (1950).

With the jury as a factor, it is pointed out that large jury rolls, primarily in densely populated areas, will insure impartiality as far as reasonably possible, for even in the most aggravated case there will be a large segment to choose from which will be unaffected by press comment. In rural areas, change of venue may be employed.[28]

These arguments, however persuasive, assume that a situation exists which has no cure and must be tolerated, simply because restraints on the press are intolerable. This is an assumption which resolves the controversy, however, and should not be made unless an opposed position is unworthy of merit. Once it is resolved that press comment in pending litigation, either with or without a jury, is not to be restrained in the absence of a "clear and present danger," then we can look to means to improve the position of the court, but this point must be arrived at first. The concession which such a position as this approach requires one to make is too great, for it resolves a very real problem without deliberation.

It has also been pointed out that in many of the specific cases occurring since *Bridges v. California* other means employed in the dissemination of news, namely, radio and television have equally been as guilty in affording publicity to pending litigation, but the courts have insisted upon singling out the press for attack in disregard of the other two.[29] This would seem to say that there is an over-sensitivity within the courts toward the press, perhaps due to an improper use of the term "trial by newspaper," and consequently a tendency to castigate it even in situations where it is only partly to blame. Assuming that such a situation exists, it does not apply to the merits of the problem involved and furnishes no support for the extremes of the "clear and present danger" test which would result from its application. The assumption here, however, is again too great an assumption and attacks the court for not having what all arguments in favor of the press assume the courts to have; impartiality. One cannot on the one hand argue that it is the courts' duty to insure impartiality and that a judge ought not be affected by out of court publications, and on the other argue that the judiciary is over-sensitive to press comment, and hence not impartial to it.

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[28] *Ibid.*

[29] Hanson, *Supra* note 4.

What appears quite obvious from the arguments upholding the press is a clear adaptation of the so-called "preferred position" doctrine which has emanated from statements of Supreme Court Justices in First Amendment cases. This doctrine, in its broadest form, asserts that freedom of speech and press hold a superior standing to other constitutional guarantees and when the two conflict, the latter must give way. This position is not acceptable to all the present and recent justices, and their opinions show that there is a doctrinal conflict underlying the issue. Take for example, this statement of Justice Cardozo:

> So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action.[30]

So, too, Justice Rutledge expressing himself along similar lines stated:

> Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending.[31]

These assertions are to be contrasted with other statements made by justices in First Amendment cases. Take for example, Justice Frankfurter:

> I deem it a mischievous phrase (preferred position), if it carries the thought, which it may subtly imply, that any

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[30] Palko v. Conn., 302 U.S. 319, 327 (1937).

[31] Thomas v. Collins, 323 U.S. 516, 530 (1944).

> law touching the communication is infected with presumptive invalidity.[32]

and Justice Jackson, in his dissent in *Brinegar v. United States:*

> We cannot give some constitutional rights a preferred position without relegating others to a deferred position . . . .[33]

This is an extremely important aspect of the problem, for it falls within the essential area of approach, where very often the entire problem is, for all practical purposes, resolved. Once the press is squarely placed in its ivory tower, it becomes untouchable and remains so until it goes to extremes bordering on the physical infringement of the rights of others, something the press is not equipped to do, and a means which can hardly be called well calculated. It is submitted that you cannot approach a controversy which, on the one hand involves the press, and on the other a recognized guaranty of due process, such as the right to a fair and impartial trial, and place either, at the outset, in a preferred position. In the abstract it may be permissible to say First Amendment guaranties are the most sacred but this abstraction must not be considered when other constitutional rights are infringed upon by someone using a right included within the First Amendment. When it is, you have the dire consequences of *Bridges v. California,* which means a judge in handling pending litigation must do so amid the most extreme criticism and calculated obstruction, simply because it is promulgated by the press. Consider here the statements of Justice Black in the *Bridges* case.

> What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.[34]

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[32] Kovacs v. Cooper, 336 U.S. 77, 90 (1949).

[33] 338 U.S. 160, 180 (1949).

[34] Bridges v. California, *Supra* note 2, at 263.

This means that no matter how outrageous press comment may become one must concede that there is no clear and present danger, for who dares to argue that something printed in a newspaper has any effect whatsoever on the average judge possessing the usual attributes found among the judiciary. It is submitted that the clear and present danger rule with its requirement of extreme peril measures the results in such cases by the success or failure of the publication. Because a judge ordinarily will not be affected by unfair press comment of a pending case is no argument for breaking down the obvious fact that a judge should not have to decide a case amid unfair comment. This is so not because a judge is himself in a preferred position, absolved from all criticism, but because he is called upon to decide whether certain rights placed before him by litigants are to be, in one manner or another, either beneficially or adversely affected, and in his hands must be the means to insure that outside influences shall not be brought into play as far as reasonably possible. Place the test on the success or failure of the press comment to obstruct justice in pending litigations and you have no test at all. For all practical purposes freedom of the press becomes absolute within the confines of this controversy.

It is submitted that the rule of law set forth by Justice Holmes in *Paterson v. Colorado*[35] is by no means in conflict with our sacred principles of free speech and press. The rule has to be limited to pending litigation and any attempt to include within it publications commenting on a judge himself or his conduct in past litigation should not be allowed. No distinction, however, should be made between litigation in which a jury is involved except a distinction of degree. The importance must be placed on the article itself and its tendencies, not upon its effect. To do so places a judge in the intolerable position of admitting that a publication has, because of his inability to turn it aside, created a situation where a "clear and present danger" to the administration of justice exists. This is an improper and degrading role for the judiciary to find itself in, and what is more important, a return to the former rule will not only remedy the situation but will involve no infringement of First and Fourteenth Amendment guarantees.

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[35] 205 U.S. 454 (1907).

RICHARD MULLANEY

Anti Discrimination Legislation as It Affects Real Property Rights

Down through the ages discrimination because of race, creed, color, or national origin has presented a grave social problem. Governments in the past have often seen fit to exploit minority groups by means of slavery or class distinctions. More often, in recent times, governments have simply overlooked the problem, refusing to assume any responsibility for it or to take any corrective action.

We, in the United States and especially in the state of New York, are fortunate in that our governments are not only aware of this problem, but have taken steps toward its solution.

There is, however, a growing concern that in this, as in many other fields of social legislation, the anxiety for eliminating the problem will lead to the enactment of measures which will themselves jeopardize rights heretofore considered inalienable.

This is exemplified by the ever increasing conflict of the right of persons to be treated equally under the law with the right of owners of real property to control and dispose of their property as they see fit.

The need for some sort of state action aimed at eliminating discrimination has long been recognized by our government. One of the basic concepts upon which our nation is founded is that all men are created equal.

Simply stating this, however, was not enough. The first real step in correcting the problem was, of course, the fourteenth amendment,[1] which guaranteed to all men the equal protection of the laws. This amendment had the effect of making any state or federal laws of a discriminatory nature unconstitutional.

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[1] U.S. Const. amend. XIV.

Thereafter, the courts, in interpreting the amendment, have generally held that any state action whatsoever is unconstitutional if it is discriminatory.[2] This, of course, extended to all activities of the state and federal governments and was not limited merely to legislation.

In 1938 the constitutional convention in this state adopted Article I, Section 11 as part of the state bill of rights.[3]

This section provides as follows:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed, or religion be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Soon after the passage of this amendment there followed a considerable amount of anti-discrimination legislation. It was declared unlawful to discriminate on the basis of race, creed, or color, in labor unions and employment agencies; and employers were forbidden to discriminate on such a basis in their employment practices.[4] Discrimination was declared unlawful in places of public accommodation, resort, or amusement.[5]

In 1945, the State Commission Against Discrimination, otherwise known as SCAD, was created for the purpose of aiding in the prevention and elimination of such discriminatory practices within the state.[6] The Commission was given authority to hold hearings, investigate complaints, and issue orders to cease and desist, where discrimination in violation of the law was found to exist.

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[2] Shelley v. Kraemer, 334 U.S. 1 (1947); Merced Dredging Co. v. Merced County, 67 F. Supp. 598 (D.C., S.D., Cal., 1946); Norris v. Mayor, 78 F.Supp. 451 (D.C. Md. 1948).

[3] N.Y. CONST. art. I, § 11.

[4] N.Y. EXECUTIVE LAW §§ 290–95.

[5] N.Y. CIVIL RIGHTS LAW §§ 40–41.

[6] N.Y. EXECUTIVE LAW §§ 290–95.

Up to this point, there had been little, if any, interference with the real property right of private owners by way of anti-discrimination legislation.

Public housing was, of course, subject to the provisions of the state and federal constitutions with regard to equal protection of the laws, since to allow discrimination in such facilities would obviously constitute state action and consequently be unlawful. The New York Public Housing Law accordingly prohibits such discrimination in state-constructed low cost housing projects.[7]

Likewise, restrictive covenants in deeds, which demand that the purchaser practice discrimination on the basis of race, creed, or color, were held to be unenforceable. In 1948, the United States Supreme Court held, in the case of *Shelley v. Kraemer,*[8] that for a state court to enforce such a covenant, would be state action and discrimination by the state. This would constitute denial of the equal protection of the laws within the meaning of the fourteenth amendment, and such enforcement would consequently be unconstitutional. However, the court also held that the private and voluntary enforcement of such covenants, by the individual owners of property affected thereby, was in no way violative of the constitution. This doctrine was reaffirmed by the court in two similar cases that year.[9]

These decisions were, of course, binding upon the state courts in so far as the constitutionality of such covenants and of their enforcement was concerned. This effectively overruled any previous state decisions holding them to be enforceable.[10]

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[7] N.Y. PUBLIC HOUSING LAW § 223.

[8] 334 U.S. 1.

[9] McGhee v. Sipes, 334 U.S. 1 (1947); Hurd v. Hodge, 334 U.S. 24 (1947).

There have naturally been many attempts by legislators to gain passage of bills which would restrict the right of owners of private real property to grant, or refuse to grant, an interest therein as they see fit.

Prior to 1950, however, all such bills uniformly met with failure. Repeated attempts to alter the Redevelopment Companies Law,[11] so as to restrict such companies in the free choice of their tenants, have failed in the legislature.[12] Likewise, bills seeking to declare *the opportunity to purchase or lease real property* to be a civil right, so as to bring it within the protection of Article I, Section 11 of the state constitution, met with similar failures.[13]

Thus, it was clear that, even though the elimination of discrimination was considered generally to be a worthwhile and necessary objective, the legislature, at least until 1950, was unwilling to allow any infringement upon real property rights, of private owners, in order to speed up the accomplishment of this purpose.

The courts had always recognized and subscribed to this policy, holding that *the opportunity to acquire real property interests* was not a civil right; that nothing in the federal or state constitutions could be construed as in any way limiting or restricting the right of the owner to freely choose his vendees, lessees, or tenants; and that discriminatory acts of private individuals who were not acting under power or constraint of the state or performing any governmental function, were not in violation of the fourteenth amendment.[14]

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[10] *E.g.,* Ridgeway v. Cockburn, 163 Misc. 511, 296 N.Y.Supp. 936 (1937); Dury v. Neely, 69 N.Y.S. 2d 677 (1942).

[11] N.Y. Sess. Laws 1942, ch. 845 as amended, N.Y. Sess. Laws 1943, ch. 234, N.Y. Sess. Laws 1947, ch. 840.

[12] Assem., 1948 Sess. Int. 127, Pr. No. 127; Assem., 1948 Sess. Int. 217, Pr. No. 217; Assem., 1948 Sess. Int. 1270, Pr. No. 1294; Assem., 1947 Sess. Int. 35, Pr. No. 35; Assem., 1947 Sess. Int. 72, Pr. No. 72.

[13] Assem., 1947 Sess. Int. 34, Pr. No. 34; Assem., 1948 Sess. Int. 128, Pr. No. 128; Assem., 1948 Sess. Int. 715, Pr. No. 720; Assem., 1948 Sess. Int. 1177, Pr. No. 1197.

In the case of *Dorsey v. Stuyvesant Town Corp.*[15] decided by the court of appeals in 1949, the respondent, a redevelopment company, refused to lease an apartment in its development to the appellant because of appellant's color. Thereupon appellant brought an action for an injunction restraining respondent from denying accommodation in its development to any person because of that person's race or color. The respondent was able to acquire land and certain tax advantages, through the assistance of the state and New York City governments, pursuant to the New York Redevelopment Companies Law. However, the housing project which it erected and the land which it purchased for that purpose were entirely financed by its own funds.

The court here held for the respondent, stating, in part,

> The aid which the state had afforded to respondents and the control to which they are subject are not sufficient to transmute their conduct into State action under the constitutional provisions here in question.[16]

From this holding, it was apparent to those who favored the extension of anti-discrimination legislation to restrictions upon private real property, that further legislation would be necessary if such publicly assisted housing facilities as Stuyvesant Town, which were privately owned, were to be prevented from practicing discrimination.

Finally in 1950, a bill prohibiting discrimination in *publicly assisted housing* was successfully passed in the legislature. This bill became Article 2-A of the Civil Rights Law.[17]

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[14] Shelley v. Kraemer, 334 U.S. at 13; Civil Rights Cases 109 U.S. 3; Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E. 2d 541 (1949).

[15] Dorsey v. Stuyvesant Town Corp., *supra* note 14.

[16] 299 N.Y. at 536, 87 N.E. 2d at 551.

The first section of this article reads as follows:

> 1. This article shall be deemed an exercise of the police power of the state for the protection of the welfare, health and peace of the people of this state and the fulfilment and enforcement of the provisions of the constitution of this state concerning civil rights.
> 2. The practice of discrimination because of race, color, religion, national origin or ancestory in any publicly assisted housing accommodations is hereby declared to be against public policy.[18]

The next three sections set forth definitions, enumerate unlawful discriminatory acts, and provide for certain remedies for the aggrieved parties.[19]

However, to insure that the restrictions of this statute would reach no further than the generosity of the public coffers, the last section of the article provides:

> The provisions of this section shall not apply to privately owned housing accommodations which are not publicly assisted within the meaning of section 18-b (3) of this chapter.[20]

Shortly after this statute became effective, the case of *Novick v. Levitt & Sons, Inc.*[21] was decided. In this case the defendant, Levitt & Sons, Inc., was operating a housing project known as Levittown. Plaintiff was a lessee of one of the homes therein and a tenant of defendant. Plaintiff alleged that defendant refused to renew plaintiff's lease because plaintiff had allowed members of the Negro race to enter the premises and associate with plaintiff and his family thereon. A reading of the facts of the case would tend to bear out these allegations. Defendant's project was financed completely by private funds and without the assistance of the state. However, certain outstanding bank loans made to defendant for the purpose of financing this project were insured by the Federal Housing Administration. The plaintiff claimed that this constituted publicly assisted housing and that consequently such discrimination by defendant was unlawful.

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[17] N.Y. CIVIL RIGHTS LAW, art 2-A, § 18a(3).

[18] N.Y. CIVIL RIGHTS LAW, § 18a.

[19] N.Y. CIVIL RIGHTS LAW § 18b, c, d.

[20] N.Y. CIVIL RIGHTS LAW § 18e.

[21] Novick v. Levitt and Sons Inc. 200 Misc. 694 (1951).

The court held that this was not sufficient to classify defendant's project as publicly assisted housing within the meaning of Article 2-A of the Civil Rights Law, and that, therefore, the defendant could freely choose to whom it would rent its houses. This decision was later affirmed by the appellate division.[22]

In 1955 and 1956, Article 2-A was amended so as to clarify the term *publicly assisted housing* generally, and especially to include multiple dwellings and large housing projects which are financed in whole or in part by FHA, VA, or other government insured loans.[23] This amendment did, however, include a provision to the effect that such housing would be considered publicly assisted only so long as such loan, or a government commitment for insurance thereof, was outstanding.

In 1956, the legislature also amended article 15 of the Executive Law so as to bring *publicly assisted housing* within the jurisdiction of the State Commission Against Discrimination, and to subject violators of this provision to the remedial and penal procedures provided for in that article.[24]

Probably the first and latest real test of the constitutionality of article 2-A came on January 16, 1958, when the Supreme Court, Westchester County decided *New York State*

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[22] *Id.* 279 App. Div. 617 (1951).

[23] N.Y. CIVIL RIGHTS LAW § 18b (3), as amended N.Y. Sess. Laws 1955, ch. 341, N.Y. Sess. Laws 1956, ch. 563.

[24] N.Y. EXECUTIVE LAW § 290.

Commission Against Discrimination v. Pelham Hall Apartments Inc.[25]

The petitioner SCAD commenced this proceeding to enforce its cease and desist order directed against alleged discriminatory acts of respondents.

The respondents were held to be operating a publicly assisted multiple dwelling, within the meaning of article 2-A of the Civil Rights Law, because of an outstanding FHA insured loan. The only question then remaining was that of the constitutionality of the statute. In this respect the court held that the statute in question was a reasonable exercise of the police power of the state and that private property rights must yield to this power in what is considered to be the interest of public welfare. The court also held that the statute is not arbitrary or discriminatory in including certain types of housing and not others, since the legislature is authorized to proceed on a step by step basis in the enactment of anti-discrimination legislation.

The result of this case, then, is that a New York supreme court has declared Article 2-A to be constitutional.

The case was referred to by the court of appeals in *Matter of Perricone v. New York State Commission Against Discrimination*,[26] wherein appellant, Perricone, had moved to intervene in the *Pelham Hall* case. This motion had been denied by the trial court and its decision was upheld by the appellate division.

The court of appeals dismissed the appeal for its failure to state a substantial constitutional issue.

This decision does not, of course, mean that the court of appeals has declared article 2-A constitutional; and while there is no assurance that it will do so if and when a proper constitutional issue involving the statute is presented, there is little justification for assuming that it will not.

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[25] 170 N.Y.S. 2d 750, (1958).

[26] 4 N.Y. 2d 874, 150 N.E. 2d 712, 174 N.Y.S. 2d 243 (1958).

In view of the statutes, cases, and common law on the subject dealt with in this comment, it appears that the law of the State of New York in connection therewith, as it now exists, can be summarized as follows:

(1) In public housing facilities (that is those built, owned, or operated by the state or federal government or any political subdivision thereof) no discrimination may lawfully be practiced.[27]

(2) Such discrimination is also unlawful in privately owned and operated, but publicly assisted housing.[28] This includes all housing accommodations, within the state, which:

  (a) After July 1, 1950 received certain direct aid from the state or federal government as defined in the Civil Rights Law.[29]

  (b) Is a multiple dwelling, or a housing project of ten or more contiguous houses, financed in whole or in part, after July 1, 1955, by FHA, VA, or other forms of government insured loans, as specified in the Civil Rights Law.[30]

(3) Accommodations operated by a religious or denominational organization as part of its religious or denominational activities do not, under any circumstances of public assistance, fall under the restrictions of the law in respect to discrimination.[31]

(4) Privately owned housing accommodations, not deemed to be publicly assisted within the meaning of section 18-b of the Civil Rights Law, are unaffected and the owners thereof have a free choice of vendees, lessees, and tenants.[32]

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[27] N.Y. PUBLIC HOUSING LAW § 223.

[28] N.Y. CIVIL RIGHTS LAW § 18a–e.

[29] N.Y. CIVIL RIGHTS LAW § 18b (3a–d).

[30] N.Y. CIVIL RIGHTS LAW § 18b (3e, f), (6).

[31] N.Y. CIVIL RIGHTS LAW § 18b (2).

[32] N.Y. CIVIL RIGHTS LAW § 18e.

(5) Restrictive covenants of a discriminatory nature are unenforceable in state courts. However, voluntary adherence to them by the owners of private property, which property is not considered to be publicly assisted, is not unlawful.[33]

(6) The SCAD has jurisdiction over complaints of discrimination in violation of the law and it may issue an order to cease and desist, which order can be enforced by the courts.[34]

(7) Parties aggrieved by unlawful discriminatory acts may:

  (a) File a complaint with the SCAD [35]

  (b) Proceed independently in the courts for injunction, damages, or other appropriate remedy.[36]

(8) Persons who wilfully interfere with the SCAD in the performance of its duties or who wilfully disobey an order of the commission shall be guilty of a misdemeanor, punishable by imprisonment for not more than one year, or a fine of not more than five hundred dollars, or both. However, legal proceedings for a review of the order shall not be construed to be such wilful conduct.[37]

In reflecting upon the course which the law has taken during the past twenty years, it is obvious that during this period much has been done to eliminate the age old problem of discrimination.

It is equally discernible, however, that during the last eight years of this period, each step taken toward the accomplishment of this end has been taken at the cost of abridging the right of real property owners to control their property and dispose of interests therein as they wish.

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[33] Shelley v. Kraemer, *supra* note 14; McGhee v. Sipes, *supra* note 9; Hurd v. Hodge, *supra* note 9.

[34] N.Y. EXECUTIVE LAW § 296.

[35] N.Y. EXECUTIVE LAW § 297.

[36] N.Y. CIVIL RIGHTS LAW § 18d.

[37] N.Y. EXECUTIVE LAW § 299.

No one could seriously argue that such a process is not taking place. The questions are: Can this be done within the framework of the Constitution? And if so, how far shall we go?

Such questions as these, which bear upon human nature as well as political philosophy, are never easily answered. It is difficult if not impossible to find a proper solution to such problems; and indeed once solutions have been attempted, it will, in all probability, be for future generations to determine the wisdom thereof. Be that as it may, it is those who are immediately confronted with these problems who must deal with them as best they can.

In the present problem, what is essentially involved is a clash between two basic, fundamental rights, that of equal protection of the laws as opposed to the right of control over one's own private property.

Both of these have long been recognized as inherent and inalienable rights of free men and indeed as indispensable elements of our American system of democracy. As such they are protected by the federal and state constitutions.[38]

Now, logically, it is the duty of the legislatures and the courts to protect both of these basic rights with equal determination and vigor. But what are these bodies to do when a situation such as the present one arises whereby, in order to protect one they must restrict or infringe upon the other?

It has been held in countless cases in the courts of New York as well as in the United States Supreme Court that such rights, however fundamental they may be, are subject nevertheless to the reasonable application of the police power of the government, exercised in the interest of the public welfare.[39]

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[38] N.Y. Const. art. I, §§ 6, 7, 10, 11; U.S. Const., amends V, XIV; 16 C.J.S. Con. Law, § 209; New York State Commission Against Discrimination v. Pelham Hall Apartments Inc. 170 N.Y.S. 2d at 757, (1958).

Certainly, however, it would be neither reasonable, nor in the interest of the public welfare for the state to place its police power so firmly behind the cause of one such right that it would effectively disregard and substantially abridge the other.

It would seem, therefore, that the question of constitutionality of legislation in such a conflicting field of the law bears directly on the question of how far the state can go in lending the support of its police power to one of the rights in question.

This brings us to the second question, "how far shall we go?".

There are those who maintain that we have gone too far already; that to place any such restriction upon the rights of property owners is unconstitutional and that to do so is a step down the road toward state-control of private property which will eventually evolve into socialism and finally into a communist dictatorship.

On the other hand there are those who propound the theory that the justification for anti-discrimination legislation is founded solely upon the needs of minority groups to gain public acceptance. They maintain that until such acceptance is complete, the state has not only the right but the duty to proceed on its present course regardless of the rights of property owners.

There have been several bills introduced in the legislature recently which propose an extension of the anti-discrimination laws to certain types of housing which are in no way aided by the goverment. Notable among these, is the so-called Metcalf-Baker bill, which was introduced in the 1958 session.[40] This bill, principally, advocates the elimination of the words *publicly assisted* from the present law. This would subject all types of housing enumerated in section 18-b of the Civil Rights Law to the restrictions now imposed only upon those which have received aid from the government in one form or another. This bill failed to pass in 1958 but there is little doubt that it will be introduced again in 1959.

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[39] New York State Commission Against Discrimination v. Pelham Hall Apartments Inc., *supra* note 38.

New York City has, in fact, adopted a similar law, which was passed in late 1957, the constitutionality of which has not as yet been determined.

In both 1957 and 1958 Governor Harriman advocated passage of such a law by the legislature.[41]

In a recent interview with a commissioner of SCAD, the viewpoints of that organization in relation to this subject were solicited.[42]

While the commissioner could not speak authoritatively for the entire five man board of the commission, he expressed the view that the state should continue legislation as long as members of racial and religious minorities were not treated equally and were consequently on a basis of inequality with the majority groups.

The commissioner expressed his opinion to the effect that, although the commission was not asked to comment officially on the 1958 Metcalf-Baker bill, it would most likely support such a bill in the next session if asked to do so.

When asked what limit or goal the commission had in mind as to the extent of anti-discrimination legislation, the commissioner answered that the limit is indefinite and unforeseeable at present but that such legislation should proceed as long as there is a need for it.

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[40] Assem., 1958 Sess., Int. 1508, Pr. No. 1510 (Introduced in Assembly Jan. 20, 1958).

[41] Annual Message of the Governor to the Legislature 1957, 1958.

[42] Interview with Commissioner J. Edward Conway, New York State Commission Against Discrimination, Oct. 9, 1958.

Now sociologically it can be argued that such legislation should proceed unchecked until all further need for it is obviated by the complete elimination of discrimination. But whether it can constitutionally be carried to that extent is another matter.

The court, in the *Pelham Hall* case, held that the legislature may proceed on a step by step basis in enacting anti-discrimination legislation [43] and that

> Broad discretion resides in the legislature, comprised of elected representatives of the people, to decide what is necessary in the interest of the public good. . . . The court has no super legislative powers and a legislative act may not be annulled by a court merely because it doubts the wisdom thereof.[44]

While it is unquestionably true that a court cannot strike down a statute merely because it doubts the wisdom thereof, it would seem not only within the power of the court but in fact, its solemn duty to strike down such a statute if it doubts the constitutionality thereof.

Now it seems logical that in a conflict of rights, such as we have here, there must necessarily be a line, beyond which we can not infringe upon one basic right in favor of another. For if we allow legislation favoring the one to proceed unchecked, even on a ''step by step'' basis, the other will eventually be abridged to the point where it will be a right in name only and, as a practical matter, will have little if any value whatsoever.

The legislature, in exercising its broad discretion, should, of course, not attempt to overstep this line. Conceivably, though, this could happen.

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[43] New York State Commission Against Discrimination v. Pelham Hall Apartments Inc., *supra* note 38.

[44] *Id.* at 758.

It was with such situations as this in mind that the framers of our constitution took the precautions of declaring our basic, fundamental rights therein, and incorporating in these instruments a system of checks and balances to insure their protection.

If at any time the legislature should enact statutes which reach beyond this line, it would seem proper and in fact necessary for the courts to declare them unconstitutional.

Whether, in the present situation, the legislature has gone too far is, of course, a matter of conjecture. It would certainly seem a fair evaluation of the situation, however, to say that the law, as it stands today, is extremely close to the line.

No matter what one's opinion of the wisdom of the present law pertaining to publicly assisted housing may be, it is still possible to find a reasonable justification for it. It can be said that one who accepts government aid, in whatever form it may be, for his private property, should, in some measure at least, be subject to the wishes of the government with respect to such property.

It is virtually impossible, however, to see any rational legal basis for placing such restrictions on private real property which is unassisted by the state. To do this would, in effect, be to completely deny to the owner of such property his freedom of choice as to whom he may grant an interest therein.

Yet such legislation has been enacted in New York City and it is now urged that it be enacted on a state-wide basis.

It is difficult to see how such statutes could fairly be said to be constitutional. It appears to be clearly beyond the line and consequently an undue infringement upon the private property right.

Even the police power of the state is limited to action which is not unreasonable, arbitrary or discriminatory.[45]

This legislation seems unreasonable in that it destroys the owner's free choice of lessees and tenants on property which is his own and is in no way supported or assisted by the government.

Is it reasonable that a basic, fundamental, inherent, and inalienable right such as this should be so abridged because the state desires to assist certain minority groups in gaining social and economic acceptance in society more quickly than they otherwise normally would? Granted, the cause of these minority groups is an honorable one. But in this situation it appears that there is an attempt to make the end justify the means. When we must sacrifice one of our constitutional rights to gain the desired end, the price is too high to make the means even justifiable, much less reasonable.

Also, the proposed state legislation would seem arbitrary in that it restrict the rights of only some private property owners. For example, the owner of a group of ten contiguous houses would be subject to the restrictions of the statute, whereas the man with only nine such houses would not be. There is nothing significant about the number ten which would make the distinction drawn at that point any less arbitrary than, let us say seven, nine or fourteen houses. It is argued that statistics show that if those persons with ten or more houses are required to admit certain minority groups, then the housing problem of these groups could probably be solved without extending the law to smaller housing projects. Even granting these statistics to be correct and unchanging, where is the legal justification for such a distinction?

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[45] *E.g.,* Adamec v. Post, 273 N.Y. 250, 7 N.E. 2d 120 (1937); People v. Ford Motor Co., 271 App. Div. 141, 63 N.Y.S. 2d 697, (1946); People v. Faxlanger, 1 N.Y. 2d 393, 135 N.E. 2d 705 (1956).

It would appear then, that the proposed legislation could well be considered not only unreasonable but arbitrary as well.[46]

It would seem altogether proper in the present situation to urge that the legislature proceed no further in placing restrictions on private real property. It appears equally appropriate to express the belief that any state legislation of this nature as well as the aforementioned New York City statute, will be declared unconstitutional if and when they reach the courts.

It is certainly an extreme view of the subject, which is held by those who maintain that our present anti-discrimination laws have started us well down the road to socialism. But their concern is not entirely without foundation. It is conceivable that should the development of these laws proceed unchecked on its present course, we may well find that a very real danger of this nature exists.

If we do not stop here, where the advancement of public funds, which provide the last reasonable link between the state and privately owned property, leaves off, where then shall we stop? If the state is allowed to tell an owner, who is in no respect indebted to it, that he may not refuse to rent to certain persons, why could it not also tell him that he *must* rent or even sell to certain persons? Why then could it not tell him if and when he must sell, and at what price? And if this be done, can it not be said that since the owner has virtually no control over the property, he is not in reality the owner, and merely holds the property at the pleasure of the state? Can this all be done, under our constitution, in the name of the equality of man?

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[46] Margardt v. Castoro, 68 N.Y.S. 2d 327 (1947); People on Information of Iasilli v. Nadler, 1 Misc. 2d 31, 146 N.Y.S. 2d 35 (Magis. Ct. N.Y.C.) (1955); Motley v. State Board of Barber Examiners, 228 N.C. 337, 45 S.E. 2d 550 (1947); Poraco v. Dept. of Agriculture, 118 Cal. App. 2d 348, 257 P 2d 981 (1953); Village of Larchmont v. Gilbert, 137 N.Y.S. 2d 389 (1954); People v. Ford Motor Co., *supra* note 45; State v. Double Seven Corp., 70 Ariz. 287, 219 P 2d 776 (1950); Application of Barry Equity Corp., 276 App. Div. 685, 96 N.Y.S. 2d 808 (1950); Lee Optical of Okla. v. Williamson, 120 F.Supp. 128, 348 U.S. 483 (1955).

CHARLES H. WITHERWAX

The Protection of Indigent Defendants' Right to Counsel in New York State

"From ancient times, lawyers have pledged themselves 'never (to) reject . . . the cause of the defenseless or oppressed . . . for lucre or malice.' "[1] The members of the Bar have given generously of their time and energy in response to this tenet, but their charitable efforts alone have not been able to cope with the increasing incidence of inadequate legal representation due to poverty.[2] Many persons confronted with the charge of committing a crime are not only financially unable to retain counsel[3] but are not fully apprised of their right to counsel.[4] The result is that the indigent criminal defendant may not have his rights fully and fairly protected.[5]

All persons charged with the commission of crime possess rights designed to protect them from being wrongfully convicted. This is provided for in the fourteenth amendment of the basic law of our nation as follows: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These fundamental principles are embodied in article I, sections 6 and 11 of the Constitution of the State of New York, wherein it is stated that "no person shall be deprived of life, liberty or property without due process of law'' and ''no person shall be denied the equal protection of the laws of this state or any subdivision thereof.''

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[1] N.Y. JUDICIARY LAW, 778–779 (oath of admission) in People v. Breslin, 4 N.Y. 2d 73, 79, 149 N.E. 2d 85, 172 N.Y.S. 2d 157 (1958) (Dye, J., dissenting).

[2] S.Res. 34, A.Res. 41, N.Y. Leg., (1957); NATIONAL LEGAL AID ASSOCIATION, OBTAINING JUSTICE FOR THE INDIGENT ACCUSED OF CRIME 7 (1957).

[3] S.Res. 34, A.Res. 41, N.Y. Leg., (1957); Address by Orison S. Marden, President of the National Legal Aid Association, *A Public Defender System for New York State? Yes—With Some Qualifications,* Summer meeting NYSBA, June 29, 1957 in 1957 N.Y.S. B. BULL., 292.

[4] NLAA, *op. cit. supra* note 2.

[5] N.Y. JUDICIAL CONF. 3d ANN. REP. DOC. No. 91 at 154 (1958).

In order that complete protection of these constitutional rights be afforded an accused, the federal constitution provides in the sixth amendment that ''in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.'' Included in article I, section 6 of the Constitution of the State of New York is a similar statement that ''no person shall be held to answer for a capital or otherwise infamous crime . . . unless . . . the party accused shall be allowed to appear and defend in person and with counsel as in civil actions. . . .'' These provisions not only guarantee the benefit of counsel, if desired, but are interpreted as a directive to the courts to furnish counsel if the accused cannot provide his own.[6]

> . . . the right to the aid of Counsel . . . (is) one of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[7]

Indigence is a prevalent condition among those accused of crimes.[8] Such persons may not only be poor in purse, but also lacking in mental astuteness. Many who are arrested, with or without financial means to employ counsel, are uninformed and inexperienced and may plead guilty to crimes in order to save time and trouble, or to win suspension of sentence.[9] They do not realize that a plea of guilty may ultimately affect their rights and privileges as citizens of the community, even depriving them of employment. This is particularly true of young people appearing for the first time before the courts.[10]

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[6] Note, INSTITUTE OF JUDICIAL ADMINISTRATION, PUBLIC DEFENDER 1 n. 3 (1956).

[7] Powell v. Alabama, 287 U.S. 45, 67–68 (1932).

[8] BEANEY, RIGHT TO COUNSEL IN AMERICAN COURTS 133 (1955); BROWNELL, LEGAL AID IN THE UNITED STATES 83 (1951).

[9] BROWNELL, *op. cit. supra* note 8 at 84.

[10] INSTITUTE OF JUDICIAL ADMINISTRATION, PUBLIC DEFENDER 2 (1956).

The provisions of both the federal and state constitutions were meant to provide "equality before the law." On the surface, every person accused of a crime has the right to have counsel represent him. Yet, conditions exist under our present law whereby an experienced prosecuting attorney with the entire resources of the police for investigation at his command is pitted against suspects who are unable to understand the legal implications of the charges against them,[11] who have not been adequately informed of their right to counsel,[12] and who could not afford to exercise it if known. As a result access to justice in this state may, at times, be unequal.

In New York, the Legislature has recognized that the rights of indigent defendants in criminal matters must be properly cared for. In addition to the constitutional safeguards, it is provided that "when the defendant is brought before a magistrate upon an arrest . . . the magistrate must immediately inform him . . . of his right to the aid of counsel in every stage of the proceedings. . . ."[13] The magistrate "must allow the defendant reasonable time to send for counsel . . ." and upon the defendant's request, notify counsel.[14] If the "defendant require the aid of counsel, (the magistrate) must, after waiting a reasonable time therefore, proceed to examine the case. . . ."[15] It is only after an indictment is filed and the defendant is arraigned[16] that "the court must assign counsel" if desired.[17]

As to the courts of special sessions, which have original jurisdiction in the case of misdemeanors, offenses, violations and infractions,[18] the statutes impose a similar duty to inform the defendant of his right to counsel and allow a reasonable time for obtaining one before proceeding.[19]

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[11] BROWNELL, *op. cit. supra* note 8, at 61.

[12] NLAA, *op. cit. supra* note 2.

[13] N.Y. CODE CRIM. PROC. § 188.

[14] N.Y. CODE CRIM. PROC. § 189.

[15] N.Y. CODE CRIM. PROC. § 190.

[16] N.Y. CODE CRIM. PROC. § 296.

[17] N.Y. CODE CRIM. PROC. § 308.

[18] N.Y. CODE CRIM. PROC. § 56.

Although "there is no constitutional or statutory provision which requires the assignment of appeal counsel to an indigent defendant,"[20] the New York Court of Appeals has held that under certain conditions the area of the right to counsel extends to appeals. It stated that a failure to appoint counsel for an indigent appellant "prevented an effective use of the right to appeal in violation of the constitutional guarantees of due process and equal protection. (N.Y. Const. Art. I, Sects. 6, 11)"[21]

To meet the obligation of furnishing free counsel for those unable to pay, the courts have relied upon the voluntary acceptance of assignment of defense counsel.[22] This system is the oldest and still the most prevalent method used throughout the country today.[23] In New York State, where there is a relatively high volume of criminal prosecutions,[24] counsel who serve the destitute must do so without compensation, except "where the offense charged in the indictment is punishable by death or on an appeal from a judgment of death."[25]

This structure of constitutional provisions, statutes and case law is meant to safeguard the basic rights of defendants, indigent or otherwise. Whether it affords the protection under law which it was designed to give, is a question which has been asked frequently by many learned jurists and answered in the negative.[26]

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[19] N.Y. CODE CRIM. PROC. § 699 (1) (2).

[20] People v. Breslin, 4 N.Y. 2d 73, 78, 149 N.E. 2d 85, 172 N.Y.S. 2d 157 (1958).

[21] People v. Kalan, 2 N.Y. 2d 278, 140 N.E. 2d 357, 159 N.Y.S. 2d 480 (1957).

[22] N.Y. JUDICIARY LAW, 766 [Canons of Professional Ethics, (4)].

[23] HASSETT, INDIGENT DEFENDANTS IN THE FEDERAL COURTS, 16 BRIEF CASE No. 4, at 115 (1958).

[24] BROWNELL, *op. cit. supra* note 8, at 125.

[25] N.Y. CODE CRIM. PROC. § 308.

Although it is specifically provided that counsel must be assigned after indictment and arraignment, no such mandate exists as to the right to have counsel assigned at the time of arrest. It is during this interval after arrest that the defendant is required to appear before a magistrate [27] for a preliminary examination [28] or be required to plead to a charge [29] which is within the jurisdiction of a court of special sessions.[30] Although he must be informed of his rights to remain silent,[31] he may confess to the charge or plead guilty to the information. And in the case of preliminary proceedings, it has been held that it is immaterial whether the defendant was informed of his rights and represented by counsel so long as he is assigned counsel upon arraignment and represented by counsel in all proceedings before the trial court.[32] Therefore, it may be concluded that an indigent defendant in New York State does not have an absolute right to have counsel assigned before the time of arraignment. If such a defendant receives no legal counsel of any kind during the interval between his original detainment and arraignment upon information or indictment, he does not have his rights assured to the same extent as a defendant who has retained an attorney and obtained professional guidance during that vital period.

Another grave shortcoming is the failure of the statutes to provide for the assignment of counsel to an indigent defendant upon appeal. Even though it has been held that in certain cases indigent defendants are entitled to be afforded counsel on appeals,

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[26] N.Y. JUDICIAL CONF. REP., *op. cit. supra* note 5, at 157.

[27] N.Y. CODE CRIM. PROC. § 165.

[28] N.Y. CODE CRIM. PROC. § 190.

[29] N.Y. CODE CRIM. PROC. § 699 (3).

[30] N.Y. CODE CRIM. PROC. § 56.

[31] N.Y. CODE CRIM. PROC. § 196.

[32] People v. Langford, 2 Misc. 2d 713, 156 N.Y.S. 2d 751, 753 (Schenectady County Ct. 1956), *aff'd* 4 App. Div. 2d 919, 166 N.Y.S. 2d 933 (1957).

> . . . section 308 does not require the assignment of counsel on appeal . . . irrespective of the merits of the appeal . . . . (T)he determination of whether counsel should be assigned in post-conviction proceedings in a given case should be left to the court . . . . (who) may refuse a request for the assignment of counsel in the proper exercise of discretion.[33]

Thus, a defendant may have a right to the aid of counsel at every stage of the proceedings,[34] but an indigent defendant does not have the right to have counsel assigned to furnish him the aid to which he is entitled.

It is within this framework that the assigned counsel system attempts to provide defense for indigents. Whether it is an adequate means of providing representation, is another question. Many feel that the system works reasonably well in small communities,[35] but when the cases of poor persons needing defense become numerous, the voluntary and uncompensated services of counsel may be deemed insufficient.[36]

The opinion of both judges and lawyers has been, that competent counsel and adequate investigation facilities have not been made available to indigent persons charged with crime.[37] With the advancement in crime detection and investigation, the prosecuting attorney has become such a specialist that the average practitioner, let alone the inexperienced young attorney without background of litigation, may be no match for him.[38] Pitted against a district attorney with a comparatively large staff of deputies, assistants, clerks, investigators, process servers, stenographers, and other personnel, plus funds and modern investigation facilities, the assigned lawyer even if proficient in criminal trials, has an over-whelming burden. He not only must give gratuitously of his time, but spend his own money for investigation, witness fees, and other expenses. Though such effort is put forth, the attorney lacks the required facilities to adequately investigate the facts and circumstances surrounding the crime, necessary for the proper defense of his client.[39] This system of assigning unpaid counsel may well be as unfair to the lawyer as it is to the defendant.[40]

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[33] People v. Breslin, 4 N.Y. 2d 73, 76–78, 149 N.E. 2d 85, 172 N.Y.S. 2d 157 (1958).

[34] N.Y. CODE CRIM. PROC. § 188.

[35] NLAA, *op. cit. supra* note 2 at 5; 1957 NYSBA REP. OF COMM. ON LEGAL AID 178 (1956); 6 N.Y. JUDICIAL CONF. 3d ANN. REP. DOC. No. 91 at 164 (1958).

[36] ID. CONF. REP. at 156; 1946 J. B. A. DISTRICT OF COLUMBIA 73; Marden, *supra* note 3.

[37] S.Res. 34, A.Res. 41, N.Y. Leg. (1957).

As a result of the deficiencies observed in the aforementioned statutes providing for the assignment of counsel and the assigned counsel system itself, certain abuses have arisen. Although the poor person, as well as any other defendant is assured the opportunity to communicate with counsel from the time he is apprised of such right at the preliminary hearing, he has not the right to have counsel assigned until he is arraigned upon an indictment.

If an indigent accused has been taken into custody upon a charge solely within the cognizance of the Supreme Court,[41] it is possible under our system for such a defendant to spend several weeks to several months in jail without advice of counsel before he is arraigned.[42] Since assigned

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[38] NLAA, *op. cit. supra* note 2; Address by Mr. Justice Rutledge, Fifth Annual Open Legal Aid Meeting, ABA Convention, September 1941.

[39] S.Res. 34, A.Res. 41, N.Y. Leg. (1957).

[40] Harrington & Getty, *The Public Defender: A Progressive Step Towards Justice,* 42 A.B.A.J. 1139, 1141 (1956); N.Y. JUDICIAL CONF. 2d ANN. REP. (1956).

[41] N.Y. CONST. ART. VI, § 1.

[42] BROWNELL, *op. cit. supra* note 8, at 204.

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counsel might meet him for the first time at arraignment,[43] there is a distinct possibility that the accused's rights may have been infringed.[44]

It has occasionally been heard that such a defendant, not being able to produce bail, has been kept incommunicado until every effort has been given forth to obtain a damaging confession or admission. "He is subjected to constant suggestion that he plead guilty, . . . that if he throws himself on the mercy of the court it will go easier with him." [45] Most plead guilty upon arraignment and many of these are guilty. But usually, it is the professional criminal, well aware of his rights, who will say nothing until he sees his lawyer; [46] or those who have the physical and mental capacities necessary to withstand these pressures and plead not guilty and receive appointment of counsel. Of the innocent ones, "it is the poor, ignorant, intimidated person, unrepresented by counsel and unadvised by friends, (who is) most apt to plead guilty." [47]

When the defendant is brought before a magistrate of a court of special sessions having exclusive jurisdiction to try misdemeanors as prescribed in the Code of Criminal Procedure,[48] the magistrate must inform him of his right to the aid of counsel in every stage of the proceedings, must give the defendant a reasonable time for obtaining counsel, and then require the defendant to plead.[49] There is no provision for the assignment of counsel as provided in section 308 of the Code of Criminal Procedure after indictment and upon arraignment. Here the defendant is before the court which will try the case upon an information.

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[43] N.Y. CODE CRIM. PROC. § 308.

[44] INSTITUTE OF JUDICIAL ADMINISTRATION, PUBLIC DEFENDER 9, (1956).

[45] Address by Judge Miller, Associate Justice of the U.S. Court of Appeals for the District of Columbia, 19th Annual Legal Aid Conference, September 19, 1941 in BROWNELL, LEGAL AID IN THE UNITED STATES 141 (1951).

[46] BEANEY, *op. cit. supra* note 8, at 207.

[47] Address cited note 45, *supra.*

[48] N.Y. CODE CRIM. PROC. § 56.

[49] N.Y. CODE CRIM. PROC. § 699 (1–3).

Many of these minor offenses or misdemeanors present complex issues and carry fairly severe penalties.[50] The plight of the indigent criminal defendant charged with the commission of a non-indictable misdemeanor and arraigned in a court not of record before a justice who may or may not be an attorney[51] has been recognized by the New York State Bar Association, Committee on Legal Aid, which reported:

> There is always a large group of these individuals who have been arrested for the first time and who are often given the impression that because of this first arrest and the fact that misdemeanors are not considered serious, in comparison to felonies, that it is wise and expedient to plead guilty to the charge as the courts in most instances will, because of its being a first offense, mete out a suspended sentence or place the defendant on probation. It has further been observed that because of the emotional factors and the stress of circumstances surrounding a first arrest and arraignment that these defendants do not fully comprehend the court's advice that they are entitled to counsel and frequently plead guilty without the benefit of counsel. It is seldom, if ever, that it appears that these individuals have at any time been informed of the seriousness and of the gravity of a conviction and the fact that it usually remains against a person's record for a lifetime, . . . a particular need exists for the protection of these persons.[52]

Claims that the right to counsel has been abridged may be indicated by the numerous applications for the writ of error coram nobis predicated on alleged violations thereof.[53] After time for appeal has expired a motion for a writ of error coram nobis, made before the sentencing court to vacate and set aside a judgment of conviction upon the ground that defendant was not advised of his right to counsel, is the exclusive remedy.[54] This common law writ is also available where conviction was secured as a result of coercion of the defendant by the police.[55]

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[50] BROWNELL, *op. cit. supra* note 8, at 84.

[51] See N.Y. CONST. ART. VI, § 19.

[52] REP. OF COMMITTEE ON LEGAL AID, *supra* note 35.

[53] N.Y. CODE CRIM. PROC. § 684, e.g., People v. Richetti, 302 N.Y. 290, 99 N.E. 2d 908 (1951).

As may be seen, the aforementioned deficiencies leave the way open for the perpetration of certain abuses, which may or may not be corrected by post-conviction proceedings. The result is that the danger of erroneous convictions based on insufficient evidence or because evidence sufficient to ensure acquittal was not available, is appreciably increased. Therefore, the right to counsel, designed to prevent the wrongful conviction of the innocent, does not accomplish to the fullest extent the purpose for which it was intended.

In response to the feeling that the help afforded through the assigned counsel and legal aid systems is too limited, legislation has been introduced in the United States Congress[56] and in the New York State Legislature[57] to authorize the establishment of a public defender whose duty it would be to defend all persons charged with crime who are financially unable to retain competent counsel for their defense. None of the bills have become law.

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[54] People *ex rel.* Sedlack v. Foster, 299 N.Y. 291, 294, 86 N.E. 2d 752 (1949).

[55] People v. Van Nostrand, 4 App. Div. 2d 913, 166 N.Y.S. 2d 823 (1957).

[56] H.R. 398 and H.R. 2091, 83d Cong., 2d Sess. (1954); S.630; H.R. 637, 3142, 3229, 3881, 4103, and 6872, 84th Cong., 1st Sess. (1955); H.R. 108, H.R. 3791, 85th Cong., 1st Sess. (1957); S.3275, 85th Cong., 2d Sess. (1958).

[57] S.Int. 1890, Pr. 2036; A.Int. 2172, Pr. 2276, N.Y. Leg. (1954); S.Int. 2230, Pr. 2370; A.Int. 2301, Pr. 3863, N.Y. Leg. (1955); S.Int. 251, Pr. 3792; A.Int. 1056, Pr. 1071, N.Y. Leg. (1956); S.Int. 1376, Pr. 1433; S.Int. 377, Pr. 1507; A.Int. 492, Pr. 2447, S.Int. 3203, Pr. 3393; A.Int. 3675, Pr. 3817; A.Int. 1028, Pr. 1044; S.Int. 3388, Pr. 3578; A.Int. 1162, Pr. 1191; A.Int. 890, Pr. 899; S.Int. 3282, Pr. 3472; A.Int. 3947, Pr. 4089; S.Int. 2363, Pr. 4337, N.Y. Leg. (1957); S.Int. 879, Pr. 2215; S.Int. 1012, Pr. 4099; A.Int. 3084, Pr. 3191, N.Y. Leg. (1958).

It is said that these proposals have not been enacted in New York State because the legislature has not been furnished with the facts and evidence establishing the necessity for such legislation.[58] It is true that much of the information in this field has as its source subjective opinion. In order to acquire such empirical knowledge so as to ascertain the need for such legislation, a resolution was introduced in 1957 wherein it was proposed that a joint legislative committee be appointed.[59] In 1958 an act creating a temporary state commission for the same purpose was introduced and it too died in committee.[60]

No one will deny that indigent criminal defendants are entitled to counsel, but exception is frequently taken as to the method by which this can best be accomplished. Any system for the provision of counsel to the indigent defendant should meet certain minimum standards. Such a system should provide immediate, loyal, adequate, full and qualified legal representation.[61]

In solving the problem of supplying free counsel to indigent and unrepresented persons accused of crimes, four systems are used in this country today, namely: [62] (1) assigned unpaid counsel; (2) assigned paid counsel; (3) legal aid or voluntary defender offices financed privately; (4) public defenders supported with government funds.

New Jersey established an assigned counsel plan which is considered to be the best within this traditional system.[63] Appointments are made in rotation from an alphabetical list composed of the attorneys who are active members of the various county bars. All serve without compensation.

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[58] S.Res. 34, A.Res. 41, N.Y. Leg. (1957).

[59] *Ibid.*

[60] A.Int. 1009, Pr. 1009, N.Y. Leg. (1958).

[61] Kelly, *Minimum Standards for a Defender Service,* 16 BRIEF CASE NO. 3 at 76 (1958).

[62] N.Y. JUDICIAL CONF. 3d ANN. REP. DOC. NO. 91 at 155 (1958).

[63] *Id* at 158.

One of the benefits derived from this plan is that the attorney is assigned to serve an average of once every year and a half and required to do actual trial work about once in two or three years, thereby decreasing the loss of income.[64] This plan has still failed to obviate the condition of assigning counsel as late as arraignment upon indictment and leaving unrepresented those indigent defendants who are before the New Jersey Municipal, Juvenile, Domestic Relations and Superior Courts. Not only does assigned counsel receive no compensation, but again he must bear the expenses of investigation, travel, and stenographic services.[65] Such a condition may well result in a greater number of guilty pleas.[66] County judges and prosecutors claim that by strictly adhering to the alphabetical order list, a defendant's rights may be occasionally jeopardized when an attorney is assigned whose criminal law or trial experience is inadequate.[67]

The Report of the Junior Section of the New Jersey Bar Association on Indigent Criminal Representation points out that although a determined effort was made to modernize the assigned counsel system, it stated that:

> . . . . New Jersey suffers with her sister states from the fundamentally objectionable aspects of the assignment system, namely: The inexperience of counsel, the inadequacy of professional resources and funds, the delay and loss of time and money in the insufficent practice of criminal law.[68]

In short, the New Jersey plan does not achieve the goal of equal justice under the law.

In New York a suggested modification of the unpaid assignment system is to reimburse counsel for expenses entailed, so as to avoid out-of-pocket loss plus contribution of time. Recognizing the difficulty involved in acceptance of court assignments which would result in financial loss in addition to the time involved, and the necessity of fully protecting the constitutional rights of indigent defendants, the Judicial Conference in 1956,[69] recommended enactment of a bill which would amend section 308 of the Code of Criminal Procedure to provide that in any felony case where services are rendered by assigned counsel the court may allow such counsel his personal and incidental expenses.[70] This would at least give financial relief to experienced attorneys and still assure their service by paying their expenses. But such a plan would best work where the criminal court calendar is light and where it is used to supplement an established system bearing most of the burdens of assignment.[71]

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[64] ADMINISTRATIVE OFFICE OF THE COURTS, REPORT ON THE ASSIGNED COUNSEL SYSTEM IN NEW JERSEY 14 (1955).

[65] *Id* at 30.

[66] *Id* at 24–26, 39.

[67] *Id* at 17, 18.

[68] 80 N.J.L.J. 237, 251 (1957).

Another possible innovation to the assignment system is that of compensating assigned counsel on an *ad hoc* basis.[72] If the compensation is adequate, there may be criticism of assignment to ''friends.'' If the government paid assigned counsel what they normally receive if privately retained, the total cost would be prohibitive. But payment of unremunerative fees would cause the system to suffer from the same defects as the unpaid assigned counsel system.[73]

Private organizations, sustained solely by contributions from the public and the Community Chest, providing free legal services to indigent defendants in criminal cases, are very limited in number. In over forty years only four privately supported legal aid societies in the entire country have extended their service to criminal as well as civil cases. They are located in Cincinnati, New Orleans, Pittsburgh and New York City.[74] In the United States today, there are only eleven voluntary defender offices.[75]

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[69] N.Y. JUDICIAL CONF. 2d ANN. REP. (1956).

[70] S.Int. 3282, Pr. 3472; A.Int. 3947, Pr. 4089, N.Y. Leg. (1957).

[71] N.Y. JUDICIAL CONF. REP., *op. cit. supra* note 62, at 158.

[72] MASS. JUDICIAL CONF. 32d REP. 43 1956; H.R. 108, ff. 13–23, 85th Cong., 1st Sess.

[73] N.Y. JUDICIAL CONF. REP., *op. cit. supra* note 62, at 158.

In 1957, the Criminal Courts Branch of the Legal Aid Society of New York City furnished counsel to over 30,000 persons. This privately supported institution handled fifty-seven percent of all cases in the Court of General Sessions in New York County; forty-three percent of all defendants appearing in the regular Felony Court in New York County, forty-six percent of the youths arraigned in the Youth part of that court, and fifty-eight percent of those who appeared in Women's Court. In one of the federal courts in which they appear, legal aid lawyers participated in thirty-eight percent of the cases.[76] This organization has performed a fine service in its area. But it should be noted that due to limited facilities and insecure financial resources, the position of a legal aid society engaged in defending the indigent may at times be precarious.[77]

In Rochester and Buffalo, New York, a plan is being carried out which combines certain features of the public and voluntary defender systems. The legal aid societies in these cities are receiving tax funds to provide defender service in certain of the courts in Monroe and Erie counties.[78]

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[74] Address by Orison S. Marden, President of the National Legal Aid Association, *A Public Defender System for New York State? Yes—With Some Qualifications,* Summer Meeting NYSBA, June 29, 1957, in 1957 N.Y.S. B. BULL. 292.

[75] National Legal Aid Association, Legal Directory section III at 58 (1957–1958).

[76] Alfred, *The Work of the Criminal Courts Branch,* 56 LEGAL AID REV. No. 1 at 6.

[77] LEGISLATIVE REFERENCE SECTION OF THE NEW YORK STATE LIBRARY, THE PUBLIC DEFENDER 3 (1949); INSTITUTE OF JUDICIAL ADMINISTRATION, PUBLIC DEFENDER 1 (1956).

[78] Summary of Proceedings of The 35th Ann. Conf. of the National Legal Aid Association, Rep. of the President, Orison S. Marden 8 (1957).

These quasi-public defender offices were established pursuant to section 224 (10) of the New York County Law, which reads:

> The board of supervisors of any county having a population of over two hundred thousand may appropriate such sums of money as it may deem proper toward the maintenance of a private legal aid bureau or society organized and operating for the aid or relief of needy persons residing within the county.

Under this provision the defender is chosen by and is answerable to the local legal aid society who controls and supervises the office through a board of directors composed of lawyers and other community leaders.[79] Some believe that under this plan there will be the assurance of adequate resources with which to facilitate the complete protection of an indigent defendant's rights, plus independence from government and political interference. It should be noted that the defender office is completely dependent upon the county board of supervisors for appropriations. The Judicial Conference of the United States recognized the weakness of such a system when it expressed the view that "private organizations providing free legal services to indigent defendants in criminal cases should not be subsidized by grants of Government funds." [80]

In our country, the first office of public defender was created in 1913.[81] The movement was initiated in Los Angeles county and adopted by the State of California in 1921.[82] Since that time similar offices have been established in response to the feeling that the help afforded through the assigned counsel and legal aid systems is too limited. As a result, today there are a total of eighty-seven defender offices which are supported by municipal, county or state tax funds.[83]

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[79] Allison & Hassett, *Counsel for the Indigent Defendant,* 41 J. AM. JUD. SOC'Y No. 4 (1957).

[80] U.S. JUDICIAL CONFERENCE, REP. OF THE PROCEEDINGS OF A SPECIAL SESSION 33 (1958).

[81] LEG. REF. SECTION N.Y.S. LIBRARY, *op. cit. supra* note 77, at 1.

[82] CAL. GOV. CODE § 27700.

Those in favor of establishing defender offices point out that the great advantage which this system enjoys over privately financed ones is that it has the monetary resources with which to enable it to supply full and complete representation to the accused indigent.[84] It is said that the system supplies experienced counsel who are expert in criminal law practice and may properly protect a defendant's rights.[85] Such an office may be deemed more efficient and economical due to the intensive concentration in one field of the law.[86] The defendant is not only represented at an earlier stage of the proceedings, but the investigational facilities provided allow a defendant to show all the facts and circumstances relating to his defense.[87]

The opponents of the system realize that the lack of funds hinder legal aid, but claim that once the government prosecutes a man and purports to defend him, the power of the state becomes absolute.[88] It is asserted that there is a sifting of the deserving from the non-deserving cases so that the defendant's innocence or guilt is passed upon by the public defender.[89] Now, even though inexperienced, the young lawyer is zealous, whereas a public defender may not even be impartial, nevertheless a partisan for the accused.[90]

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[83] National Legal Aid Association, Legal Directory section III at 58 (1957–1958).

[84] N.Y. Judicial Conf. Rep., *op. cit. supra* note 62, at 162.

[85] NATIONAL LEGAL AID ASSOCIATION, OBTAINING JUSTICE FOR THE INDIGENT ACCUSED OF CRIME 7 (1957).

[86] Freeman, *Shall We Have a Public Defender,* 1948 MICH. S.B.J. 13–18.

[87] LEG. REF. SECTION N.Y.S. LIBRARY, *op. cit. supra* note 77 at 5.

[88] Address by Edward J. Dimock, United States District Judge, Southern District of New York, *No Public Defender System for New York State,* Summer Meeting NYSBA June 29, 1957, in 1957 N.Y.S. B. BULL. 300; Dimock, *The Public Defender; A Step Towards a Police State?,* 42 A.B.A.J. 219 (1956).

[89] *Ibid.*

[90] Steward, *Some of the Defects of the Public Defender Plan,* 1939 J. AM. JUD. SOC'Y 63–64.

For such reasons and because of the danger of political manipulation, pleas of guilty may become more prevalent, as the defender's interest in his client becomes secondary to his desire for holding his job.[91] The opponents of the system condemn it generally as being a step toward socialized law,[92] whereby the defendant will be precluded from being represented by counsel other than the public defender.[93] They conclude that the dangers out-weigh the advantages so that the old system should remain.[94]

These objections could be obviated if such an official was chosen by an administrative body which was politically independent and was not charged with the duty of appropriating funds for the office.[95] If our present system was allowed to exist in conjunction with the office of public defender, the defendant would not thereby be deprived of his own choice of counsel.[96] It would remain the defendant's decision to plead guilty or stand for trial. The question of guilt or innocence of a defendant should be left for the court and jury to decide with no prejudging on the part of any official designated as defense counsel.[97]

> Any system which would make available to the indigent defendant and render enforceable by him the rights and liberties which are his, would be completely contrary to the basic underlying theory of the police state. . . . It is not the form which matters, it is the substance and purpose of the system which are the controlling factors in the determination of (its) good or evil.[98]

The Judicial Conference of the United States, recognizing the necessity for fully protecting the constitutional rights of indigent defendants and the resulting financial loss to attorneys accepting court assignments, recommended that Congress be urged to enact legislation to provide for the appointment of public defenders or the payment of compensation to counsel appointed by the courts to represent indigent defendants accused of crime.[99]

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[91] Authorities cited note 88 *supra.*

[92] Steward, *op. cit. supra* note 90.

[93] Authorities cited note 88 *supra.*

[94] *Ibid.*

[95] N.Y. JUDICIAL CONF. REP., *op. cit. supra* note 62, at 162.

[96] *Id* at 164.

[97] *Id* at 161.

[98] *Id* at 162–163.

In order to conform with constitutional requirements and concepts of fairness and justice, the means or method for supplying adequate legal assistance for the indigent in criminal cases in New York State should be provided in statutory enactment making provision for a public defender. Such a statute should be of statewide application so that the powers, duties and method of designating the various public defenders would be uniform throughout the state.[100] The form of the statute should be mandatory in nature and not optional.[101] Otherwise, those unfortunate enough to be arrested and indicted in rural counties would be denied the benefit of representation as would be afforded those in larger communities. By allowing two or more counties to establish and maintain one public defender office to serve such counties, their financial burden could thereby be reduced.[102] Jurisdiction of the office should be comprehensive so as to include felonies and misdemeanors. The penalty for conviction in both is a deprivation of liberty or property. By providing sufficient funds, the office could handle all post-conviction proceedings, including writs of error coram nobis and habeas corpus which are an integral part of the protection accorded under the common law. ''Gaining reversal of an improper conviction is no less vital to a defendant whose liberty and reputation are at stake than presenting a defense and obtaining an acquittal from the jury in the first instance."[103] The allocation of funds must be adequate, in order to forestall the possibility that a shortage may hinder investigation and thereby prevent a complete presentation of all legal defenses which a defendant may have. It is further suggested that counsel, whether assigned, a public defender, or privately retained, should be furnished as a matter of right in all criminal courts no later than the time of preliminary hearing.

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[99] U.S. JUDICIAL CONF. REP., *op. cit. supra* note 80.

[100] N.Y. JUDICIAL CONF. REP., *op. cit. supra* note 62, at 164.

[101] See, 24 MINN. STAT. ANN. § 611.12, 611.13. But see CALIF. GOVT. CODE § 27706. Contra, N.Y. JUDICIAL CONF. REP., *op. cit. supra* note 62, at 164–165.

[102] CALIF. GOVT. CODE § 27700.

The form of the statute might read as follows:

> The Appellate Division of the Supreme Court in each department shall appoint a public defender for each county within such department.[104] The appellate division in its discretion may, however, appoint a single public defender to serve two or more counties within the department where it is deemed economically and geographically practicable to do so.[105] Every person who may be appointed a public defender must be a counselor at law admitted to practice in this state for a period of not less than five years prior to the effective date of this appointment.[106]
>
> Whenever it appears to the satisfaction of a court that any person who has been indicted by the grand jury or charged or about to be charged with the commission of any crime, is unable to employ counsel, the court shall assign the public defender to act as counsel with respect thereto.[107] It shall be the duty of the public defender to act as counsel for each defendant to whom he is assigned at every stage of the prosecution, unless the defendant request private counsel be assigned.
>
> The public defender shall prosecute all appeals to a higher court or courts of any person who has been convicted upon any such charge where, in his opinion, such appeal will, or might reasonably be expected to result in

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[103] People v. Breslin, 4 N.Y. 2d 73, 81, 149 N.E. 2d 85, 172 N.Y.S. 2d 157 (1958) (Fuld, J., dissenting).

[104] N.Y. JUDICIAL CONF. REP., *op. cit. supra* note 62, at 162.

[105] CAL. GOV. CODE § 27700.

[106] S.Int. 1012, Pr. 4099, ff. 14–16, N.Y. Leg. (1958).

[107] S.Int. 1012, Pr. 4099, ff. 17–84, N.Y. Leg. (1958); S. 3275, f. 10, 85th Cong., 2d Sess. (1958).

> the reversal or modification of the judgment of conviction or modification or reduction in sentence or penalty.[108] Should the public defender fail to prosecute the appeal, the court having jurisdiction of such appeal shall, upon application of a defendant to appeal as a poor person, direct the assignment of other counsel to represent the defendant in the appeal proceedings if the court considers that there is reasonable ground for appeal.

To implement the aforementioned statute a provision in the Code of Criminal Procedure might be enacted, to wit:

> No confession shall be admissible in evidence nor plea of guilty accepted unless there is a showing that the accused has in fact consulted with counsel prior to the taking thereof. Proof of consultation shall be shown by affidavit signed by the consulting attorney.

By providing for representation of defendants at the earliest possible time, that is, prior to the making of any damaging statements, the statute would assure defendants who are indigent or of low mentality the protection of their fundamental rights. Though it may make it difficult in some instances to obtain confessions, to prevent the wrongful conviction of the innocent is as important as punishing the guilty.

> The social advantage of obtaining voluntary confessions of guilt before an attorney can advise a prisoner to remain silent is balanced by the injustice in the coerced and unwarranted confessions of those who feel they are in a hopeless position, with no escape possible.[109]

The fact that a defendant is assured communication with counsel of his own choice and the opportunity of conferring with him first, does not, in and of itself, mean that no defendants would confess or plead guilty.

The guarantee of the sixth amendment to the United States Constitution does not lend protection only to those who can afford a defense, but to all persons. "Justice before the law must mean equal justice to everyone regardless of ability to pay.''[110] It must never be so expensive that all can not have the benefit of it.

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[108] S.Int. 1012, Pr. 4099, ff. 21–25, N.Y. Leg. (1958).

[109] BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 129 (1955).

> 'Although the defendant may be the worst of men;' and his guilt clear, 'the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected.'[111]

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[110] Harrington & Getty, *The Public Defender: A Progressive Step Towards Justice,* 42 A.B.A.J. 1139, 1140 (1956).

[111] People v. Gitlow, 234 N.Y. 132, 158, 136 N.E. 317, in People v. Breslin, 4 N.Y. 2d 73, 83, 149 N.E. 2d 85, 172 N.Y.S. 2d 157 (1958) (Fuld, J., dissenting).

JOSEPH FRIEDMAN

Appointment of Counsel as a Matter of Right in Criminal Appeals

The problem to be discussed herein is by no means one difficult of understanding, however there is a diversity of opinion on the New York bench as to the correct rule to be applied. The present New York rule in respect to the subject is illustrated in the following case.

Defendant was convicted of the crime of attempted extortion and subsequent thereto made a motion to the appellate division for leave to prosecute an appeal as a poor person and to have the appeal heard on the original record. He also moved for the appointment of counsel and for an enlargement of time. All were granted with the exception of appointment of counsel. The defendant had in his possession a copy of the record and he submitted a brief to the appellate court. The appellate division affirmed the conviction and from such affirmance the defendant appealed to the court of appeals where counsel was assigned and a brief was submitted on behalf of the defendant, alleging as error the denial of assistance of counsel to prosecute defendant's appeal to the appellate division.[1] This, defendant contended, was a denial of due process of law. The majority of the court of appeals was of a contrary opinion and stated that there was no such right to counsel on appeal and that any appointment along those lines was within the sound discretion of the appellate court, and further, because there was no substance to defendant's original appeal, the appellate division was justified in denying the assistance of counsel.[2]

One thing seems clear and that is that in the absence of statute or a specific provision in a state constitution there is no right as such to an appeal from a criminal conviction.

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[1] People v. Breslin, 2 App. Div. 2d 876, 156 N. Y. S. 2d 1000 (1956).

[2] People v. Breslin, 4 N.Y. 2d 73, 149 N.E. 2d 84, 172 N. Y. S. 2d 157 (1958).

By statute in New York State it is provided that,

> If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel.[3]

Thus, New York makes the services of an attorney available to persons against whom criminal prosecutions are pending.

The Constitution of New York states that,

> No person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel. . . . No person shall be deprived of life, liberty or property without due process of law.[4]
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> No person shall be denied the equal protection of the laws of this state or any subdivision thereof.[5]

The Constitution of the United States provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[6]

The weight of authority upon the subject considered in the *Breslin* case is contrary to what at first glance might seem to be the necessary rule. *A priori* it would surely seem that if a sovereign has taken upon itself to provide for an appeal in criminal cases, that as a logical result thereof a person entitled to prosecute such procedure is of right eligible to prosecute it in the most effective manner. The most effective manner is without a doubt with the assistance of counsel.

It should be noted at this point that an appeal, as a matter of due process, is not essential. Except as provided by constitution or statute there is no right to an appeal in any respect.[7] This proposition should be distinguished from situations where by statute an appeal is available, but nevertheless there is discrimination between persons permitted to avail themselves of it. New York has, by its Code of Criminal Procedure, provided for appeals from judgments of conviction in criminal actions or proceedings.[8] The appeal is an appeal as a matter of right,[9] not because of any due process requirement, but rather because New York State has felt that justice will be better served thereby. Should New York decide to repeal the above section no one could be heard to say that due process has been violated. The only contention that could be made would be on policy grounds and indeed those are the grounds upon which the present rule has been most persuasively attacked.

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[3] CODE OF CRIMINAL PROCEDURE § 308.

[4] N.Y. CONST. art. I, § 6.

[5] N.Y. CONST. art. I, § 11.

[6] U.S. CONST. amend. XIV, § 2.

With these few introductory statements, it is now appropriate to examine some of the rationale pro and con as to the duty of an appellate court to assign counsel to indigent defendants in criminal actions. Remarks will be confined to a large degree to the opinions expressed in New York cases.

It should first be noted that there is a divergence as to the fundamental reasons for accepting or not accepting the proposition that counsel should be assigned. The appellant in the *Breslin* case purportedly argued on due process grounds, but his argument was consumed by a conglomeration of state and federal decisions, including the Supreme Court of the United States.[10] The proverbial handwriting on the wall would seem to suggest that a due process argument is somewhat less than appealing to the courts when the basis of such argument is refusal to appoint counsel to argue an appeal. At least one reason for this position is that it is thought that an appellate court can, on its own, review the record without aid of briefs or argument and that the rights of appellant will be adequately protected. There are those who would doubt this, however, as shown by the dissent of Judge Fuld in the *Breslin* case at pages 81–2,

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[7] People v. Sedoti, 1 App. Div. 2d 232, 149 N. Y. S. 2d 371 (1956).

[8] CODE OF CRIMINAL PROCEDURE § 517.

[9] People v. McKane, 7 Misc. 371, 28 N. Y. Supp. 175 (Sup. Ct. 1894).

[10] Mellott v. Underwood, 192 Fed. 2d 1020 (6th Cir. 1951); Gargano v. United States, 137 Fed. 2d 944 (9th Cir. 1943); Ex Parte Lee, 123 F. Supp. 439, *aff'd* 217 F. 2d 647 (1st Cir. 1954), *cert. denied* 348 U. S. 975; Osborne v. Johnston, 120 Fed. 2d 947 (9th Cir. 1941); Lovvorn v. Johnston, 118 Fed. 2d 704 (9th Cir. 1941), *cert. denied* 314 U. S. 607; People v. Logan, 137 Cal. App. 2d 331, 290 P.2d 11 (1955); Sykes v. Warden, 201 Md. 662,

> . . . experience has demonstrated that there are just not enough hours in the day to permit judges of busy appellate courts, no matter how conscientious and willing, to examine and read the records before them as carefully or as critically as single-minded counsel for the appellant. And, if, as is the case where an indigent defendant is involved, there is but one copy of the record, and that typewritten, the task of adequate review without the aid of appellate counsel to point the alleged errors and call attention to the asserted questions of law, some of which might otherwise escape the judges, approaches the impossible.[11]

Justice Harlan has expressed his views as to what constitutes an effective appeal. He feels that there is a tendency in the New York bar "to regard the oral argument as little more than a traditionally tolerated part of the appellate process", and that it is felt that the briefs are determinative of the decision. This, he states, is a greatly mistaken view. He goes on to say that while briefs are important, particularly in complicated cases, there are four good reasons why there should be oral argument in addition:

> First of all, judges have different work habits. There are some judges who listen better than they read and who are more receptive to the spoken than the written word.
>
> Secondly, the first impressions that a judge gets of a

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93 A.2d 549 (1953), *cert. denied* 345 U. S. 937; State v. Lorenz, 235 Minn. 221, 50 N.W.2d 270 (1951); Savage v. State, 155 Tex. Crim. 576, 237 S.W.2d 315 (1950).

[11] People v. Breslin, *supra* note 2.

> case are very tenacious. They frequently persist into the conference room. And those impressions are usually gained from the oral argument, if it is an effective job.
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> Thirdly, the decisional process in many courts places a special burden on the oral argument. (This refers to the fact that decisions are often made at the close of the oral arguments or soon thereafter.)
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> Fourth, and to me this is one of the most important things, the job of courts is not merely one of an umpire in disputes between litigants. Their job is to search out the truth, both as to the facts and the law, and that is ultimately the job of the lawyers, too. And in that joint effort, the oral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.[12]

If this is the case, how can it then be said that an appeal can be effective which contemplates neither brief nor oral argument by an attorney? Is it just to fly in the face of these statements when a man's liberty is dependent thereon?

A. S. Cutler of the New York bar tells of the story of an attorney that transversed the United States to argue an appeal in a California court and before he could so much as begin his argument he was abruptly stopped by one judge of the three-judge court. The judge informed the lawyer that an oral presentation on his part would be futile. The attorney politely begged permission to continue and with the court's permission presented his case. The attorney won the case two to one. This brief story forcefully shows the value of an oral appeal by an attorney. In his concluding remarks Mr. Cutler stated, "We believe a client has not fully had his day in court unless his lawyer has pleaded orally and eloquently in his behalf. That applies to important motions, trials and appeals.''[13]

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[12] Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 7 (1955–1956).

It is realized, of course, that some or even many appeals are frivolous. Such may have been the situation in the case in which New York has now taken its stand on the right to appointment of counsel, but the fact remains that while that case may be characterized as simple, it nevertheless promulgated a rule that is to guide conduct in all future cases. Under such a rule it would seem that the possibilities of inadvertently missing substantial errors in the record are legion. The significance of this point is magnified at least to some degree when the number of reversals on appeal are considered. Each reversal means that something, in some way, has occurred which is sufficiently substantial to vitiate the judgment of the People of New York as to a person's criminality.

Another aspect of the above consideration is the palpable inability of a layman of average or even of prodigious intelligence to coherently consider the record of his case. Judge Fuld aptly presented this argument when he wrote:

> Nor is the argument of an appeal any less an art, any less a job for the skilled professional, than the conduct of the trial itself. A defendant may, as has been contended, suffer from representation by counsel lacking in adequate experience in the criminal law. That, however, is no answer, for even such counsel is better than none, and, in any event, the possibility that the representation may be inadequate furnishes neither justification nor warrant for denying all legal assistance whatsoever. No matter how intelligent or educated, a layman does not have the know-how to analyze the evidence and evaluate it, much less the special ability necessary to search out errors or argue points of law, even if he may happen to recognize them. Thus, effective submission of an appeal requires more than possession by the defendant of a transcript of the minutes of the trial. Any kind of effective presenta-

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[13] Cutler, *The Value of Oral Argument,* 44 A.B.A.J. 831, 832 (1958).

> tion demands the aid of a lawyer, and the defendant's poverty, the state of his pocketbook, should not be permitted to stand in the way of his obtaining an adequate appellate review. (See Griffin v. Illinois, 351 U.S. 12, 18.)[14]

The *Griffin* case referred to above involved a denial of a transcript of record to an indigent defendant by an Illinois appellate court which prevented an effective appeal. The court per Justice Black then said:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a state is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e.g. *McKane* v. *Durston,* 153 U.S. 684, 687–688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. See *Cole* v. *Arkansas,* 333 U.S. 196, 201; *Dowd* v. *United States ex rel Cook,* 340 U.S. 206, 208; *Cochran* v. *Kansas,* 316 U.S. 255, 257; *Frank* v. *Mangum,* 237 U.S. 309, 327.
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> All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for

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[14] People v. Breslin, *supra* note 2, at 81.

> it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.[15]

It seems therefore that there is some substance to the position that if a person is to be entitled to an appeal that it should be allowed in the most effective manner.

It might be contended that while this is theoretically sound, that nevertheless as a practical matter there must be a balancing of interests. This is the groundwork for the assertion that granting the aid of counsel is in the long run the method clearly most appropriate for avoidance of error, yet the individual attorneys who are to be called on to lend their services gratis must be considered. What does this put in the balance? On one side it means that various attorneys are going to have to work for nothing and in so doing deprive them of time in their vocation or avocations. On the other side it means that a person accused of anything less that a capital offense has his property, or much more important, his liberty at stake. In what disposition does this leave the scales? Would the scales be affected in any manner when taken into consideration is the fact pointed out by Judge Dye in his dissent in the *Breslin* case, at page 80, that the attorney's oath of admission includes the vow that he will never refuse aid to the defenseless because of money?[16] Surely such a thing is not an empty echo. It would be a strong set of books indeed that contained only assets and no liabilities.

Finally, it is not at all clear that lawyers consider assignment as an imposition. At page 80 in the *Breslin* case Judge Dye remarked that, "Experience has shown me that when attorneys are called upon by the courts to so act, they respond willingly, cheerfully and to the best of their ability. Pay is not the criterion.''[17] Again at page 82 Judge Fuld states:

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[15] Griffin v. Illinois, 351 U.S. 12, 18–19.

[16] People v. Breslin, *supra* note 2.

> The assignment of appellate counsel, it is said, 'would be placing an undue burden on the comparatively small number of attorneys trained in the criminal law' (opinion, p. 78). Not only do I entertain some doubts of that, but I believe it beside the point. Whether or no there are more trials than appeals, the fact is that trial judges are daily called upon to assign counsel to indigent defendants, and I have never heard that there has been a dearth of lawyers to represent such defendants, and without compensation. Nor can I subscribe to the thought that but a small coterie of attorneys are qualified to argue a criminal appeal or that a sense of undue burden will deter any appreciable number of lawyers from accepting a court assignment. (See, e.g., People v. Price, 262 N.Y. 410, 412.) But, if the court be right, if only a few attorneys are sufficiently expert to handle an appeal in a criminal cause, it is all the more unfair and unreasonable to require a lay person, totally devoid of training in the law and often poorly educated, to present his appeal without any legal help whatsoever.[18]

The majority of the court of appeals feel that there are so many appeals like the one in *Breslin* that it would be an injustice to appoint an attorney in every case. If that is the case it means that the burden is to be switched from the attorneys to the judges who must read the records on their own. Surely logic will tell a judge that he must read more fully and carefully when unassisted by counsel and when the brief which has been submitted has been the product of a layman. Could there ever be doubt in a judge's mind as to whether the author of the brief has overlooked something important? Wouldn't this lead a judge to read a record with this in mind? Are the judges to become quasi-public defenders?

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[17] *Id* at 80.

[18] *Id* at 82.

How many fact situations appear clear cut upon a first reading, but upon further inspection reveal a complexity deserving of diligent research? How often is the complexity inadvertently overlooked altogether? Even the most perspicacious judge if burdened with a heavy calendar could overlook something that might mean several years of a man's life.

To touch upon the subject of frivolous appeals once again, it is said that to appoint counsel will be conducive of innumerable such appeals. There is little doubt that frivolous appeals are a burden to appellate courts, but the method of avoiding them must be a considered one. Circuit Judge Frank in a dissent has stated that denying appeals to the poor will not discourage appeals by wealthy defendants. As examples he gave "a wealthy professional criminal or a member of a wealthy criminal gang." He further stated that ". . . the fact that a defendant . . . can afford to pay his appeal is no assurance that it is not frivolous." Why then the distinction based solely on the money the defendant has? Is this a considered basis for avoiding frivolous appeals? Judge Frank also asserts that, "Surely, even if but one out of a hundred attempted appeals by indigents has merit, justice compels the conclusion that that appeal should be heard. It is no answer that so many appeals will result as to 'crowd the docket.' If so, more judges should be appointed. True, the cost of running the government will somewhat increase. But I, for one, cannot sleep well if I think that, due to any judicial decision in which I join, innocent destitute men may be behind bars solely because it will cost the government something to have their appeals considered."[19]

The equal protection element has been seen in the foregoing quotations and discussions. It is simply stated in the terms of reference of this paper to be that if a state provides an appeal as of right that there should be no arbitrary distinctions between those to whom it is available and once available the substantial effectiveness of it should not be arbitrarily less for one person or group of persons than another. An effective appeal should be available not only to those who are affluent, but also to the impecunious.

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[19] United States v. Johnson, 238 Fed. 2d 565, *judg. vac.* 352 U.S. 565 (1951).

Several of the arguments presented herein are not strict due process arguments. First of all, in the eyes of the Supreme Court of the United States, there is no right as such to have any appeal at all as far as due process is concerned. This means that it is theoretically possible for a person to have a fair disposition of his case without an appeal. But shadows of doubt cast in the form of reversals on appeal deny the conclusion that theory and practice are coterminous here. Can it be said then that simply because an argument is based upon policy, as many are, that its realization will be any the less efficacious.

Possibly one would wish to take issue with the writer on the distinction between a fair trial and one which reaches the right conclusion, that is, the truth. It is obvious that an innocent man may have a fair trial and yet be convicted. But if issue is joined upon this distinction, wouldn't it be fair to say that granted while a defendant can have a fair disposition of his case even where an appeal is denied in toto, yet wouldn't it be more just and more in keeping with our democratic traditions and theories of equality to provide a more exacting method of determining truth, especially where the denial of the more exacting method—an effective appeal—is based upon pecuniary considerations, or considerations such as imposing upon attorneys or crowding the calendar? The validity of all three of these considerations has been touched upon herein.

At least one of the possible criticisms should be anticipated at this point and that is that this paper is singular for its representation of dissents. The object of this paper is not to state what the law is, but rather simply to show that there is possibly some sense to the opinions as to what the law is not.

In connection with this it might be remarked that as to due process the states are left, at least to some degree, to develop the concept in the field here discussed. The United States Supreme Court is not dedicated to universal affirmative propositions upon the subject simply because experimentation by the States is to be encouraged. Due process is not a static concept, but rather is a malleable standard susceptible of application to the vicissitudes of human conduct. Within its bounds there is room for improvement in the states and development of state policy.

FREDERIC N. RANN

Double Recovery of Medical Payments

This comment concerns itself with the possibilities of a plaintiff receiving double recovery of medical payments when he has been injured in an accident. Such double payments would be predicated upon his having obtained judgment and payment thereon under the liability provisions of the assured's policy. He would subsequently recover the amount of his medical expenses under the medical payments provisions of the same policy.

There are only a very few reported cases in the United States dealing with this precise question. The overlapping coverage provided by these policies of insurance raise certain problems which the courts have not as yet discussed.[1] Perhaps the reason for the scarcity of cases on this subject is simply because the vast majority of claimants fail to realize that a possibility exists whereby a recovery may be had under both of the provisions of the policy. It may be inopportune at this time, and some companies, in order to avoid litigation, may offer payment, but as the number of claims increase, the companies will be forced to take some defensive action. Undoubtedly, it will eventually become so pressing that the insurance companies in the several states are going to have to litigate the matter in order to get a judicial determination of their duties and obligations.

Under the provisions of the medical payments indorsements it is provided generally that any passenger or occupant of the named insured's car or certain other non-owned cars may recover the cost of certain medical expenses.[2]

The case of *Severson v. Milwaukee Insurance Co.*[3] presented this problem to the Wisconsin Supreme Court. Here, the administrator, of one killed as a result of the collision of automobile, brought an action against the defendant insurance company, to recover payment of medical and funeral expenses under the policy's provisions. In a prior action, brought by plaintiff against the owner of both the vehicles and the insurer, judgment was recovered and paid by defendant company. In that prior judgment, there was included the sum of $1,176.66 which covered medical, ambulance, nursing and funeral expenses. This instant action was to recover the sum of $500, which constituted the limits under the medical payments provisions. The case was tried to the court without a jury upon the pleadings and a stipulation of facts. Judgment was rendered for plaintiff, and defendant appealed. The plaintiff citing *Corpus Juris Secundum*[4] argued that policies of insurance that purport to be an entire contract may in fact be severable and divisible.

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[1] Annot., 42 A. L. R. 2d 983 (1955).

[2] 8 Appleman, Insurance Law and Practice, 312 § 4896 (1942).

[3] 265 Wis. 488, 61 N. W. 2d 872 (1953).

The court stated that they found no Wisconsin cases dealing with severability or divisibility of insurance contracts, except for several cases dealing with fire insurance policies. They cited one of these,[5] and said that it stood for the proposition that separate coverages under one policy of insurance could be divisible and separable. In its holding, the court was explicit about finding this insurance policy to be divisible.

> The defendant could have issued separate policies or it could have embraced the three coverages in one policy, but it chose to use a form of policy containing many other coverages, indicating therein which coverages applied and which did not apply. A separate premium was paid for the medical payments coverage and the limits of liability were defined, the amount being $500 to each person under Coverage K. Although contained in one policy, the coverages were divisible and separable, and Coverage K must be construed as a separate contract.[6]

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[4] 44 C. J. S. Insurance § 336, 1284 (1945).

[5] Loomis v. Rockford Insurance Co., 77 Wis. 87, 45 N. W. 813 (1890).

[6] Severson v. Milwaukee Insurance Co., 265 Wis. 488, —, 61 N. W. 2d 872, 875, (1953).

The court responded to the various defenses of the defendant by also holding that plaintiff had privity of contract and that the case was not barred on the theory that plaintiff split his cause of action. The judgment for plaintiff was therefore affirmed.

The next reported case is that of *Hawayek v. Simmons.*[7] It is true that here the accident did not arise out of the operation of a motor vehicle, but the facts nevertheless lend themselves to this problem. The plaintiff was fishing with his brother-in-law when the latter made what was alleged to have been an overhand cast, which resulted in a treble hook being caught in plaintiff's eye and cheek. Plaintiff brought this action in negligence, seeking recovery for his personal injuries, medical expenses, and other damages, against the defendant, Simmons, and his liability insurer *in solido*. A trial on the merits was held, and judgment was awarded to plaintiff for the sum of $154.65, said sum representing his medical and hospital expenses. This recovery was allowed under one of the provisions of the defendant's liability policy which covered medical payments. Plaintiff's other claims were disallowed, the trial court holding that plaintiff had not sustained the burden of proving defendant's negligence. Upon appeal by the plaintiff, the court amended and affirmed the judgment by finding that the doctrine of *res ipsa loquitur* applied and that plaintiff, while assuming certain risks, did not assume the risk of being negligently struck in the eye. They therefore amended the judgment and increased the damages by $1500. Feeling that he was entitled to a still larger recovery, the plaintiff also contended that he should be allowed to recover the sum of $154.65 twice. His theory was that the defendant insurer was liable for that amount once under the medical payments clause, and again under the liability provisions as an indemnifier of Simmons for his tort.[8] With this item of damages the court ruled:

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[7] 91 So. 2d 49 (La. App. Orl., 1956).

[8] *Id* at 55.

> But we do not believe that plaintiff is entitled to recover both under the medical payments clauses and the liability clauses for medical expenses incurred in one and the same accident. It would be inequitable to construe the policy contract so as to allow the plaintiff to collect double the amount of his damage. It strikes us that a reasonable interpretation of the policy clauses would be that plaintiff had the choice of either claiming the amount of the medical expenses under the medical clauses or the liability clauses of the policy, but certainly not under both.[9]

Unfortunately, that last quoted paragraph was all that the court had to say about double recovery. It did not say why it thought it was inequitable, nor did it give its reasons for the holding. One would therefore be led to believe that, as to this single question, the law of Louisiana is *contra* to that of Wisconsin. That one would come to this conclusion would not be altogether unreasonable, if it were not for a case which was reported exactly one week less than a year later, before the Court of Appeal of Louisiana in the First Circuit.

Here, in *DiStefano v. Delta Fire & Casualty Company,*[10] an action was brought on behalf of an unemancipated minor for his personal injuries and on behalf of the mother for the sum expended by her for certain medical expenses. The lower court, under the authority of *Hawayek v. Simmons,*[11] denied recovery of $95., said sum constituting the medical expenses, which the defendant insurer had already paid under the medical payments provisions of the policy. Upon appeal, this court was critical of the holding in *Hawayek v. Simmons,*[12] stating that the decisions that construed the liability clauses to be a separate insuring agreement from the medical payments clause had not been called to the attention of the court in that case.[13] The court cited several cases to that effect including *Severson v. Milwaukee Automobile Insurance Company,*[14] and the annotation following in the American Law Reports annotated,

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[9] *Id* at 56.

[10] 98 So. 2d 310 (La. App. 1st Cir., 1957).

[11] 91 So. 2d 49 (La. App. Orl., 1956).

[12] *Ibid.*

> Medical or funeral service clauses of this type have been said to constitute, in effect, separate accident insurance coverage.[15]

The court further stated:

> A claim based on the liability feature of the policy is a tort claim; a claim based on the medical payments feature of the policy is a claim sounding in contract.
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> If Delta had two separate policies, one granting liability coverage and one granting Medical Payments Coverage, that would be no different than the situation as it presently exists where both coverages are furnished under the same policy.
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> We see no logical reason for the conclusion to be properly reached that Delta, having paid what it was obligated to pay under a contractual obligation, should be relieved of paying what it otherwise would have been obligated to pay under an obligation sounding in tort.[16]

Turning from the problem of insurance to the problem of damages, the court cited the case of *DeRoode v. Jahncke Service, Inc.,*[17] and said that it stood for the general rule that

> . . . insurance *in behalf of the injured person* cannot be set up by the wrong doer in mitigation of the loss.[18]

It was also noted that the insurer, in order to avoid this result, could have inserted appropriate language in the policy to the effect that there would be no double recovery.

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[13] DiStefano v. Delta Fire & Casualty Company, 98 So. 2d 310, 312 (La. App. 1st Cir., 1957).

[14] 265 Wis. 488, 61 N. W. 2d 872 (1953).

[15] Annot., 42 A. L. R. 2d 983, 984 (1955).

[16] 98 So. 2d at 313.

[17] 52 So. 2d 736 (La. App. Orl., 1951).

[18] 52 So. 2d 744 quoting from 25 C. J. S., Damages § 99, 647. See 15 Am. Jur., Insurance § 201, 617, 98 So. 2d at 313.

Judgment for plaintiff was affirmed and amended so as to award the $95 to the plaintiff.

Since neither of the cases went to the court of last resort of Louisiana, there has been no final judicial determination of just what is the law in this jurisdiction.

The cases in New York generally stand for the proposition that,

> It is not a defense on the merits in favor of the one who caused the loss that the plaintiff received compensation from an insurance company or from a third party, and that rule applies to cases in contract as well as in tort.[19] It has been held in numerous cases that the payment of the insurance by an indemnifier is no defense to the wrongdoer against a claim by the injured party.[20]

The American Law Reports Annotated, in discussing damages, states:

> All the later cases decided on the point seem to be generally in accord with the rule laid down in the original annotation, stating that the fact that the plaintiff is insured against personal injury does not preclude or reduce the amount of a recovery against the person responsible for his injury.[21]

The reasoning behind this seems to be not only the intelligent approach, but also the just and equitable rule. However, the danger in deciding cases and difficult problems of law by general rules is that so often the general rule is simply too general. It must be noted that these rules apply where the injured person himself has secured insurance for his own protection. This was discussed in *Farb v. Borsuk*[22] where the court said:

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[19] Gusikoff v. Republic Storage Company, 241 App. Div. 889 (1934).

[20] Herald Nathan Press, Inc. v. Bourges, 161 Misc. 208, 210, 291 N. Y. Supp. 650, 652, (N. Y. City Court, 1936) (Citing many cases).

[21] Annot., 95 A. L. R. 577 (1935) supplementing annotation in 18 A. L. R. 683 (1922).

[22] 205 Misc. 448, 128 N. Y. S. 2d 413 (Sup. Ct. Queens County 1954).

> A tort-feasor cannot avail himself of the benefits of reimbursements which plaintiff received as a result of his own good judgment and foresight in insuring himself against the contingency of accident and ill health.[23]

It is obvious that the court is here referring to a case where the injured person has procured his own insurance. It is just as obvious, in a case involving medical payments, that the insurance is not provided by the injured person but by the wrongdoer. Is it not possible that this might change the result? Evidently the court in *DiStefano v. Delta Fire & Casualty Company*[24] did not think so. They quoted the general rule from one case,[25] which in turn was quoting from *Corpus Juris Secundum* and from *American Jurisprudence.* From that particular volume of *Corpus Juris Secundum* the general rule was cited by the court, but what they did not cite or call attention to was the next paragraph which states:

> Except where the insurance has been kept up by the wrongdoer, or it is otherwise provided by statute, . . .[26]

In the volume of *American Jurisprudence* that the court called attention to, it states:

> It is well settled that the damages recoverable for a wrong are not diminished by the fact that the party injured has been wholly or partly indemnified for his loss by insurance effected by him and to the procurement of which the wrongdoer did not contribute.[27]

It is apparent that the general rule which states that a wrongdoer may not claim the proceeds of an insurance policy in favor of the injured party in mitigation of damages applies to a particular situation only. It does not apply when the facts show that the wrongdoer himself procured the insurance for the benefit of the injured party.

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[23] 205 Misc. at 450, 128 N. Y. S. 2d at 414 (Sup. Ct. 1954).

[24] 98 So. 2d 310 (La. App. 1st Cir., 1957).

[25] DeRoode v. Jahnke Service, Inc., 52 So. 2d 736 (La. App. Orl., 1956).

[26] 25 C. J. S. Damages, § 99, 648, (1941).

[27] 15 Am. Jur., Damages § 201, 617 (1938).

The equities here seem to be strongly on the side of the wrongdoer. Here is a person who was prudent enough to take out a policy of insurance to protect a particular person or a particular class of persons from certain hazards and for which he alone paid the consideration. Yet, when an accident occurs, the court tells him that the insurance he procured in favor of the injured party at his own cost, may not be used by him to reduce the damages he will be required to pay.

An example of the way the two rules work is no doubt in order. In *Seigel v. Goldstein,*[28] in a proceeding to dispossess a tenant for non-payment of rent, it was held that payment by the insurer of the rent, lost by the landlord as a result of fire damages, was no bar to the proceedings. Here the insurance was procured by the landlord. On the other hand, in *Publix Theaters Corporation v. Powell,*[29] it was held, in an action by the landlord against the defendant lessee, to recover the value of property destroyed by fire, by reason of defendant's negligence, that refusal by the trial court to allow the lessee to plead or prove the landlord's collection of insurance, under a policy kept up and paid for by the tenant, was error.

In some states the problem will probably be litigated sooner than in others. Certainly in those states that have a "guest statute," whereby an injured passenger may not recover against the negligent driver unless gross negligence is proved, the question will not arise in the same manner that it will in the rest of the states. In this respect, the writer feels that no valid prediction should be attempted at this time. The cases supporting double recovery are too few, and the reasoning behind their decision has not been too well spelled out. This is especially true of the handling given to the rules of damages. It is entirely possible that at some future date, when the question comes up, a court may simply declare that insurance policies can contain divisible contracts and, based on the few reported cases that there are, allow a double recovery. It is possible that a court in looking at the whole situation which includes not only insurance law, but the law of contracts and damages as well, would hold that since the wrongdoer had provided the insurance policy, he may plead the plaintiff's recovery under one of the policies in mitigation of his damages. It does seem that this holding would be the most equitable and would make the injured person whole, which is all that he should be entitled to recover. It also seems, at least to this writer, that this would be the more correct opinion and one that the courts will adhere to if the law on this subject is given the consideration that it deserves.

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[28] 1 Misc. 2d 839, 148 N. Y. S. 2d 266 (N. Y. Munic. Ct. 1955).

[29] 71 S. W. 2d 237 (Tex. Comm. of Appeals 1934).

SAMUEL KLAFTER

Drums Along the Power Ways

In two recent decisions, the sovereign power of eminent domain of the State of New York over Indian lands has been questioned. With respect to the applicability of the Federal Indian Intercourse Act[1] as to the State of New York, there is now a clear conflict of opinion between the Federal Court of Appeals for the Second Circuit and the New York Court of Appeals. The decision of the federal court impugns the validity of past and contemporary takings of Indian lands and throws many Indian alienated titles in the State of New York into chaos and confusion.

The first of these decisions was rendered by the New York Court of Appeals in the case of *The Saint Regis Tribe of Mohawk Indians v. The State of New York.*[2] This case dealt with the taking by the state of what is now known as Barnhart's Island, located in the Saint Lawrence River, for the use of the Power Authority of the State of New York. In demanding compensation of thirty-three million dollars for the taking, the Indians rely in one point on the application of the federal act[3] to the state.

Briefly, the facts of the case are as follows: in 1796 by treaty the Seven Nations (which includes the Saint Regis Nation) ceded to the State of New York all their lands within the state, with the exception of a six mile area used as a reservation and not in dispute herein. Prior to this treaty, the Treaty of Paris (which ended the American Revolution) called for the center thread of the Saint Lawrence River as the boundary between the Dominion of Canada and New York State, and Barnhart's Island a few hundred feet from the Canadian side of the river, would not appear to be included. Dispute arose as to the exact location of this center line and the Treaty of Ghent in 1814 provided for a commission to determine the boundary in accord with the *true intent* of the Treaty of Paris. This commission included Barnhart's Island within the State of New York. In the meanwhile the Indians had leased the island to the Barnhart's, but the state had taken this land (acting under the Treaty of 1796) and granted a patent to the Ogdens. In a resulting ejectment suit between the Barnharts (holding under Indian title) and the Ogdens (holding under state patent) it was judicially determined that the Ogden's patent was paramount. However, the State Legislature passed a bill compensating the Barnhart's for their loss of the lease. The Indians twice petitioned the legislature for compensation and in 1856 compensation was granted, on the ground that if the lessees were compensated so should the lessors. This payment is the point in controversy as regards the Indian Intercourse Act,[4] for there was no approbation of a United States Commissioner as the act required. The Indians, asserting that they still own the land and deserve compensation for the taking, argue that neither the Treaty of 1796 nor the report of the commissioners in 1814 included the island and, as the payment of 1856 was in violation of the act, it did not extinguish the Indian title.

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[1] 25 U.S.C. § 177 (1834).

[2] 5 N.Y.2d 24, 152 N.E.2d 411, 177 N.Y.S.2d 289 (1958).

[3] *Supra* note 1.

Judge Froessel, speaking for the Court of Appeals held:

> In *Seneca Nation v. Christie* (126 N.Y. 122), we stated (p. 142) with regard to that Act: "There is room for question whether the act of 1802 was intended to apply to treaties made by a sovereign state with tribes within the state for the extinguishment of the Indian title to lands therein." Our language in that case was the basis of a holding in *United States v. Franklin County* (50 F. Supp. 152) to the effect that the provisions of the Indian Intercourse Act do not apply to the State of New York. No authority has been cited to us which would indicate a contrary result.[5]

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[4] *Supra* note 1.

[5] *Supra* note 2, at 39.

It can be seen that the highest tribunal in this state has held the provisions of the act inapplicable in its exercise of the sovereign power of eminent domain.

At the same time that the *Saint Regis* case was being argued in the New York courts, another case involving this same question was being argued in the federal courts. In the case of *The Tuscarora Nation of Indians v. The Power Authority of the State of New York,*[6] the Indians tested the right of the state to enter on the Tuscarora Reservation (located in the state) and to appropriate this land for a power project.

The New York State Power Authority licensed under the Federal Power Act[7] appropriated land on the Tuscarora Indian Reservation for its use. The state used the appropriation method outlined in the New York Highway Law[8] and not the method expressed in the federal statute,[9] which requires action in the District Court of the United States. The Indians brought an action for a declaratory judgment, praying for an adjudication that the state had no authority or power to acquire the reservation lands, on the ground that the taking violated the Federal Indian Intercourse Act,[10] and that any federal authority to take these lands must be express and not implied. This latter point was in answer to the state argument that the Federal Power Act[11] gave the state implied authority to take these lands. The Indians maintained that their lands are protected by federal treaties and statutes and may not be taken without express consent of the Congress.

Circuit Judge Moore of the Second Circuit ruled:

> The court below came to the conclusion that ''There is no constitutional requirement that the appropriation now in-

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[6] No. 394—October Term, 1958 (2nd Cir. 1958).

[7] 71 Stat. § 401 (1957).

[8] N.Y. HIGHWAY LAW § 30.

[9] 16 U.S.C. § 814 (1920).

[10] *Supra* note 1.

[11] *Supra* note 7.

> volved be specifically authorized by an act of Congress" and that neither sections 177 or 233 of Title 25 U.S.C.A. presented any bar to the exercise of eminent domain. The wording of these two statutes does not, in our opinion, lead to such a conclusion. However, the same result is reached because the right of eminent domain of the United States is superior to, and could not have been extinguished by, the statutes in question. Of necessity, however, the exercise of this power must be by the United States through Congress.[12]

It can be seen that the federal court believes the Indian Intercourse Act is applicable to the state, and compliance by the state to the act is necessary to alienate Indian title even though the state be acting under its condemnation proceedings. Of course in this case the state acted under a public law,[13] which authorized the construction of public works in the Niagara River for power, and was licensed by the Federal Power Commission. For this reason, the court directed the state to reopen the proceeding on the Indian lands, but to follow the federal procedure, namely:

> . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts.[14]

Consequently the state is directed to vacate and annul the original proceeding conducted in accordance with the New York Highway Law,[15] where the easier provisions allow the Power Authority, after filing the appropriation map with the Secretary of State, to immediately enter upon and take possession of the property described.

With two such conflicting opinions, and the titles of many state acquisitions of Indian lands at stake, the state has filed a jurisdictional statement with the United States Supreme

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[12] *Supra* note 6.

[13] *Supra* note 7.

[14] *Supra* note 9.

[15] N.Y. HIGHWAY LAW § 30.

Court for a clarification of the problem. The Tuscarora Indians also moved for a writ of certiorari to the Supreme Court which was denied October 13, 1958. The appeal of the state is still before the Court. At the same time the Saint Regis Indians have moved for reargument before the New York Court of Appeals in light of the subsequent federal decision as to the applicability of the statute[16] to the state. The applicability of the Federal Intercourse Act to the State of New York in the exercise of its right of eminent domain will be the subject matter of this comment.

The Indian Intercourse Acts were passed by Congress acting under the Constitutional power to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."[17] Basically, the purpose of the statutes were to prevent the Indians from being victimized by artful scoundrels inclined to make a sharp bargain in the acquistion of Indian lands. On July 22, 1790 the United States enacted its first Indian Non-Intercourse Act, which provided in section four:

> And be it further enacted, That no sale of lands made by any Indians, or by any nation or tribe of Indians, within the United States, shall be valid as to any person or persons, or to any State, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.[18]

It will be noted that the first act to regulate trade and intercourse with the Indian tribes specifically included the states within its application.

On May 19, 1796, the Congress once again passed an Intercourse Act.[19] The language of this statute did not specifically apply to the states, and provided that the states could have their agents present at a treaty held with the Indians within the state. However, the statute required the presence of a Federal Commissioner as a condition precedent to the validity of the treaty, to adjust the final compensation to be delivered to the Indians for their lands. Also required was the condition that the treaty be entered into pursuant to the Constitution of the United States, so it would appear that the Congress relinquished none of the federal control over these transactions with the Indians.

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[16] *Supra* note 1.

[17] U.S.CONSTIT. art. I, § 8.

[18] 1 Stat. 138 (1790).

[19] 6 Annals of Congress 2910 (1796).

The Intercourse Act was again passed on March 3, 1799,[20] March 30, 1802,[21] and on June 30, 1834,[22] with essentially the same terms. These statutes do not directly address themselves to the states, and a question arises as to whether they do apply to state transactions with the Indian tribes. These statutes have laid the foundation for the present law, under which the aforementioned *Saint Regis*[23] and *Tuscarora*[24] cases are governed. The present act provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same shall be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their

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[20] 9 Annals of Congress 3955 (1799).

[21] 2 Stat. 103 (1802).

[22] 4 Stat. 729 (1834).

[23] *Supra* note 2.

[24] *Supra* note 6.

> claim to lands within such state, which shall be extinguished by treaty.[25]

This situation has been dealt with in the case of *United States v. Franklin County,*[26] which also involved the Saint Regis Indians. The court relying on this same legislative history of the statute declared:

> The history of the Act of 1802 and preceding legislation is indicative of an intent to exempt a state ''having the right of pre-emption'' from the provisions thereof. The first Indian Intercourse Act of 1790 invalidated by its language the sale of lands within the United States to any person or persons, ''or to any state, whether having the right of pre-emption or not.'' The clause was omitted from the Act of 1802 and the preceding Acts of 1796 and 1799. The omission is significant when viewed in the light of the practical construction given to the Act by both the State of New York and the United States.[27]

The practical construction referred to by the court, was the presence in evidence of fifty exhibits consisting of written instruments generally described as treaties, which purported to release land of Indian tribes to the State of New York. These exhibits covered a period from June 1785 to February 1856, and it appeared that in but six of the exhibits shown, there were recitals that a United States Commissioner was present at the time of the negotiation or execution of the treaties. This decision validated leases and deeds from the Indians to the state, where the face of the instruments did not recite the approval or presence of a commissioner.

In this *Franklin County* case[28] the court also relied on the case of *Johnson v. McIntosh,*[29] which is the first case in which the United States Supreme Court discussed the subject of the ownership of the Indian lands. The Court determined the right of the Indians to so called "tribal lands" to be one of occupancy only, with the fee in the lands remaining in the sovereign. The Court relied on the European theories of title by conquest and by purchase, deciding that the absolute title cannot exist in two different governments at the same time. Since the conquest was at this time complete, there was absolute title in the crown (the source of the United States title) which was subject only to the right of occupancy by the Indians. This of course is incompatible with absolute and complete title in the Indians. The Court stated:

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[25] 25 U.S.C. § 177 (1834).

[26] 50 F.Supp. 152 (N.D.N.Y. 1943).

[27] *Id.* at 155.

[28] *Ibid.*

[29] 21 U.S. (8 Wheat.) 542 (1823).

> So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However, this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.[30]

Chief Justice Marshall held that the title conveyed by the Indians to private individuals could not be recognized in the courts of the United States.

This same theory of Indian occupancy prompted the decision of the Supreme Court in the *Shoshone Tribe of Indians v. United States*,[31] and *United States v. Santa Fe Pacific R.R. Co.*[32] where the Court declared:

> Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.[33]

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[30] *Id.* at 590.

[31] 299 U.S. 476 (1937).

[32] 314 U.S. 339 (1941).

[33] *Id.* at 345.

However, the Court went further in this case and determined that any interference with this right can only be made by the federal government. Further on the Court stated:

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. (As opposed to tribal claim based on treaty, statute, or other action of the federal government). The power of Congress in that regard is supreme.[34]

The claim of the Indians that the Immunity Statute[35] applies to the state must rely on a series of decisions declaring that the federal government is superior to the states regarding the control of Indian tribes within a given state. A case that amplifies this principal is *Mulkins v. Snow*,[36] a New York Court of Appeals case. Here the court said:

> They are the wards of the nation and Congress has full authority to legislate for them within their reservation. (*People ex rel. Cusick v. Daly*, 212 N.Y. 183.) When the state of New York legislates in reference to their affairs, its action is subject to the paramount authority of the federal government. The contention has been made with some force that when Congress does not act, no law runs on an Indian Reservation save the Indian Tribal Law and custom.[37]

This case is referred to in *Rice v. Maybee*[38] as authority for the view that the federal government never relinquished its authority over the Indians. Another case wherein the right of the state against the paramount authority of the federal government was brought into conflict was *United States v. Charles*,[39] in which a state statute authorized a partition action after a mortgage foreclosure. Such a deed on the foreclosure of Indian lands was held invalid:

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[34] *Id.* at 347.

[35] 25 U.S.C. 177.

[36] 232 N.Y. 47, 133 N.E. 123 (1921).

[37] *Id.* at 51.

[38] 2 F.Supp. 669 (W.D.N.Y. 1933).

[39] 23 F.Supp. 346 (W.D.N.Y. 1938).

> This is repugnant to governmental policy in regard to Indian Reservations. If such sales are countenanced by the government there is danger that in time the reservation will cease to exist as such. Congress has adapted a policy of continuing the tribal relations of Indians and their rights as distinct political communities, apart from state interference. Congress alone may vary this policy.[40]

The same result was reached in *United States v. Boylan*,[41] where the same kind of state statute was in issue. However, in this transaction a United States Commissioner was not made a party. Had he been made a party to the suit (so that the Intercourse Act would be complied with) there is a possibility the case might have gone the other way. The court makes mention of the necessity of congressional action validating the transaction. Finally, the court declared that:

> We do not think the state of New York could extinguish the right of occupancy which belongs to the Indians.[42]

Early the Supreme Court decided that the State of New York was powerless to remove the Indians from their lands, and that such power resided in the federal government. In *Fellows v. Blacksmith* [43] the Supreme Court declared:

> The removal of tribes and nations of Indians from their ancient possessions to their new homes in the west, under Treaties made with them by the United States, have been, according to the usage and practice of the government, by its authority and under its care and superintendence. And, indeed, it is difficult to see how any other mode of a forceable removal can be consistent with the peace of the country, or with the duty of the government to these dependent people, who have been influenced by its counsel and authority to change their habitations.[44]

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[40] *Id.* at 349.

[41] 265 Fed. 165 (2nd Cir. 1920).

[42] *Id.* at 174.

[43] 19 How. 366 (1857).

[44] *Ibid.*

Many times the Supreme Court has pronounced this same principle of the supreme power of Congress in dealing with the lands of Indians and their alienation. In *Bunch v. Cole*[45] the Court said:

> The power of Congress to impose restrictions on the right of Indian wards of the United States to alien or lease lands allotted to them in the division of the lands of their tribe is beyond question; and of course it is not competent for a State to enact or give effect to a local statute which disregards those restrictions or thwarts their purpose.[46]

The Court has consistently struck down the application of local statutes to the Indians, where the question of restrictions on the Indian lands was concerned. In *Sperry Oil and Gas Co. v. Chisholm*[47] the Court summed up:

> Neither the constitution of a State nor any act of its legislature, whatever rights it may confer on Indians or withhold from them, can withdraw them from the operation of an act which Congress passes concerning them in the exercise of its paramount authority.[48]

It would appear that the states are not beyond the federal statutes applicable to the Indian lands, and the Immunity Statute would also apply to them, at least as far as local legislation concerning Indian lands is questioned.

The reason for this power is expressed by the Supreme Court in the case of *United States v. Sandoval*,[49] where the Court speaks of the federal power over the Indian tribes:

> As was said by this court in *United States v. Kagama*, 118 U.S. 375, 384: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its

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[45] 263 U.S. 250 (1923).

[46] *Id.* at 252.

[47] 264 U.S. 488 (1924).

[48] *Id.* at 497.

[49] 231 U.S. 28 (1913).

> exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[50]

In reading this quote however, the question should arise as to the competency of the states to handle affairs with the Indians, at least as far as they do not conflict with the federal laws. The states should be competent to carry out transactions with the Indians, at least within the state.

The State of New York has taken this view on several occasions, at least as applies to the power of the state to take the lands of the Indians under the existing state legislation. For example, in *Dixon v. State of New York*[51] the New York Court of Claims relied on several state statutes for the following decision:

> The State has authority to appropriate property on the Indian Reservation for the construction and improvement of highways. (Indian Law, § 12; Highway Law, § 53; U.S.Code, tit. 25, §§ 311, 357.)[52]

The court also mentioned that the sovereignty of the state attaches to these lands. The fee of the reservation lands being in the state, these reservation lands are regulated by the Indian Law of the State of New York. If this be the case, then surely the state can exercise its right of eminent domain on these lands. The point is made here that in the case of New York State, being one of the original colonies, the fee of the reservation lands must be in the state, and not in the federal government. The federal sovereignty did not intervene because the original colonies derived their lands directly from the British sovereign. If the fee is in the state, the right of the state to take its own property would appear to be paramount to the obligation of the statute prescribing intercourse with the Indians.[53]

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[50] *Id.* at 46.

[51] 4 Misc.2d 76, 155 N.Y.S.2d 723 (Ct.Cl. 1956).

[52] *Id.* at 78.

[53] 25 U.S.C. 177 (1834).

Furthermore, the United State Code directly provides for the condemnation of Indian lands in the following words:

> Condemnation of lands under laws of States. Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.[54]

It would appear that the Congress has given power to the states to take Indian reservation lands in the public interest. There is no mention in this statute of the presence of a United States Commissioner. As a matter of fact, the statute refers to the condemnation procedure of the individual state as being approved.

The New York Court of Appeals has dealt with this same problem once before in the case of *Seneca Nation v. Christie.*[55] In this case the Indians questioned the validity of a grant made without the permission of Congress. The court upheld the state's right to the land under the treaty, looking to the purpose of the Intercourse Act:

> The true spirit and intent of the proviso was, we think, to permit the state or its agents to enter into a treaty or convention with an Indian tribe within its borders for the purchase of a pre-emptive right, provided it was entered into in the presence of and with the approval of a commissioner of the United States appointed to attend the same, and that such a treaty is within the true meaning of the proviso, a treaty held under the authority of the United States, and requires no ratification or proclamation by the federal authorities. The policy of the state of New York has been in full accord with that of the United States in prohibiting all private dealings with and purchases from Indians, except under the supervision of public officials and with the consent of the legislature.[56]

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[54] 25 U.S.C. 357 (1928).

[55] 126 N.Y. 122, 27 N.E. 275 (1891).

[56] *Id.* at 144.

The case also mentions other treaties which had been made by the state without federal supervision and that at a latter date these treaties were formally ratified and approved by the Secretary of State of the United States, showing an intent to sanction the state action. The treaties were already in effect and this latter action was merely to remove any possible cloud on the title. In this case, a commissioner of the federal government was present at the time of the treaty. The objection of the Indians was that the Congress itself had not approved the treaty. The court made no mention of the bearing of the commissioner's presence on the decision.

As noted earlier in this comment, the court in the *Saint Regis* case[57] cited the *Seneca* case[58] as authority for the proposition that the act does not apply to the state in the extinguishment of Indian title to lands within the state. There is little doubt that the Court of Appeals believes that the presence of a federal commissioner is not necessary to validate a treaty to which the state is a party. This is a sound observation when viewed in light of the purpose of the act, which is to protect the Indian wards of the federal government from unscrupulous dealings by individuals out to make a profit on the Indians. After all, the award made by the state is subject to judicial examination in the Court of Claims, and the fairness of any award can be there adjudicated. In a private transaction this safeguard is not to be found. Furthermore, the state agents should not have an interest in any private profit, for the lands are used by the state for state purposes and all the people of the state would profit, not a few private individuals.

As mentioned before, the *Franklin County* case[59] also supported the view that the legislation does not apply to the states. The court specifically referred to the absence of a federal commissioner, and stated that a theory which would require such a presence would be repugnant to the practical construction placed on such legislation by both the state and the federal government. In conclusion, the court decided that this is a regulatory act, designed to prevent fraud, and there was no fraud alleged. It will be noted that there is no fraud charged in either the *Saint Regis*[60] or the *Tuscarora*[61] cases.

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[57] 5 N.Y.2d 24, 152 N.E.2d 411, 177 N.Y.S.2d 289 (1958).

[58] *Supra* note 55.

[59] 50 F.Supp. 152 (N.D.N.Y. 1943).

In apparent conflict with these holdings are numerous decisions striking down state legislation which interferes with the sovereign powers of the federal government. It can be said that legislation has no meaning until it is tested in the courts, therefore, no matter how long a line of dealing between the state and the Indians is traced, such repetition can not justify an illegal or invalid act.

There is another factor to be considered that differs from the one to be found in a study of the cases involving the Indian lands in the west. In the cases involving Indian lands found in the original states, there is a question as to whether the federal government did acquire the fee in the lands, as the states acquired title from the British empire after the War of the Revolution. In the cases involving western Indian lands, the federal government owned the reservation lands and merely permitted the Indians a right of occupancy. Should the state own these New York Indian lands there would exist a perfect right in the state to take these lands without the approbation of any federal commissioner. Furthermore, if all that did exist was a right of occupancy, the court need not grant compensation, following the doctrine of the *Tee-Hit-Ton Indians v. United States*.[62]

The United States Supreme Court has ruled on the peculiar status of the New York Indians in the case of *New*

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[60] *Supra* note 57.

[61] No. 394—October Term, 1958 (2nd Cir. 1958).

[62] 348 U.S. 272 (1955).

York ex rel. Ray v. Martin,[63] the most recent decision on this subject. Here it was held that the power of Congress to regulate commerce with the Indian tribes, derived under the same clause of the Constitution with the power to regulate interstate commerce, is of a similar nature, the Court saying:

> . . . in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries.[64]

There are also innumerable examples of the extinguishment of Indian title in New York, in which the United States took no part. The power of eminent domain long exercised over Indian tribes for highway and related projects, is an example.[65]

There can be no doubt that the state did have title to the Indian lands prior to the adoption of the United States Constitution. It has never been expressed that they intended to relinquish this title when the state adopted the Federal Constitution. For this reason the original states can claim to have more power over the Indian lands than can the western states. The latter entered the Union after the War of the Revolution, and the lands were originally acquired by the federal government through purchase, or by conquest. In these cases the federal government had title from the beginning and the reservation lands were carved out of the federal domain. Furthermore, the original states carried on dealings with the Indian tribes long before the federal government came into being, and it cannot seriously be considered that these transactions were set aside when the state adopted the Constitution.

So, although the Intercourse Act applies to individual transactions with the Indians regarding the alienation of their reservation lands, it would not seem that the act applies to the State of New York in its dealings with the Indians. The presence of a federal commissioner has not been deemed essential in the past and in the light of statutory history does not appear to be a condition for state transactions with the Indians. This would be especially true in the State of New York (one of the original states) where there are grounds for the belief that the state's original title to Indian lands was never relinquished when the state adopted the Constitution of the United States.

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[63] 326 U.S. 496 (1946).

[64] *Id.* at 499.

[65] Wadsworth v. Buffalo Hydraulic Assn. 15 Barb. (N.Y.) 83 (1853).

GEORGE S. KEPNER

Motion Picture Censorship Re-examined

During its early infancy the motion picture industry was not generally viewed as having any substantial contribution to make as an informative art. It was this attitude which undoubtedly prompted the U. S. Supreme Court to remark that the industry was "a business pure and simple, originated and conducted for profit."[1] Consequently the exhibition of films was held to be completely without the scope of the first amendment of the United States Constitution insuring freedom of speech.[2] Unlike the press, moving pictures were subjected to serious restraints in the interest of protecting public morals, and the general welfare, under the police powers reserved to the states under the United States Constitution.

In 1952 the U. S. Supreme Court reversed its field and decided that the first and fourteenth amendments do clearly require the states to apply the protections of free speech and press to motion pictures.[3] Furthermore the statutes by which the states seek to regulate the exhibition of moving pictures must be sufficiently precise to prevent the censor from being "set adrift upon a boundless sea amid a myriad of conflicting currents of religious [and by implication moral] views, with no charts but those provided by the most vocal and powerful orthodoxies."[4] This requirement of definiteness is obviously not something peculiar to the field of motion picture censorship. It is an extension of the customary requirement of procedural due process. The Court had previously pointed out that there can hardly be "the rule of law" if a person may be held to have violated a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . .''[5] Such a statute ''violates the first essential of due process of law.''[6] ''The constitution requires that a statute must not be too vague to allow the citizen to ascertain what course of conduct he must follow to put himself within the bounds of the law. . . . The certainty required is not tested from the would be violator's standpoint; the test is rather whether adequate guidance is given to those who would be law-abiding.''[7]

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[1] *Mutual Film Corp.* v. *Ohio Industrial Comm'n*, 236 U.S. 230, 244 (1915).

[2] *Mutual Film Corp.* v. *Ohio Industrial Comm'n,* 236 U.S. 230 (1915).

[3] *Joseph Burstyn, Inc.* v. *Wilson,* 243 U.S. 495 (1952).

[4] *Id.* at 504–505.

This requirement of due process has been the most burdensome problem which has confronted legislators who have attempted to draw censorship statutes. The holding that moving pictures like other publications come within the protections of the first and fourteenth amendments has only served to emphasize this problem. In the *Burstyn* case for example, the requirement that a picture not be ''sacrilegious'' was held to be too unlimited and undelineated a guide to be constitutional.[8] The U. S. Supreme Court apparently decided that the term ''immoral'' [and] ''of such character that its exhibition would tend to corrupt morals'' was not a sufficiently clear delineation to satisfy due process when it reversed without opinion the New York Court of Appeals decision in the *La Ronde* case.[9]

In an attempt to remedy this defect the legislature amended the EDUCATION LAW in the following manner:

> ''§122-a Definitions
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> 1) . . . [T]he term 'immoral' and the phrase 'of such a character that its exhibition would tend to corrupt morals'

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[5] *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391 (1925).

[6] *Ibid.*

[7] *United States* v. *Gambling Devices,* 336 U.S. 441, 458 (dissenting opinion).

[8] *Joseph Burstyn Inc.* v. *Wilson,* 243 U.S. 495 (1952).

[9] *Commercial Pictures Corp.* v. *Regents of the University of the State of New York,* 305 N.Y. 336, 113 N.E. 2d 502 (1954); *rev'd sub nom. Superior Films* v. *Dep't of Education,* 346 U.S. 587 (1954).

> shall denote a motion picture film or part thereof . . . which portrays acts of sexual immorality . . . or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.''

It was against this background that many of us have been stimulated to a reconsideration of the problem in the light of a recent New York Court of Appeals decision.[10] In this decision the court upheld the Board of Regents' refusal to license the film ''Lady Chatterly's Lover'' for exhibition in this state. In the banned picture, the adultery of a married woman is condoned or in the court's words ''quietly heralded as a conquest of love over the 'form' [legally established fact] of marriage.''[11] ''Lady Chatterly's Lover'' was refused a license because it allegedly was ''immoral'' in that it ''portrays acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior.''[12]

Why Do We Have Censorship?

Most authorities seem to believe that some censorship is a good thing. This may owe its cause to the feeling that there are some indignities that the general public just should not be subjected to. A more common explanation is expressly stated in the governor's memo on approval of § 122-a:

> ''The measure was introduced upon the request of the State Education Department. Concerning it the department has written as follows: 'The State Education Department believes that its primary duty is to protect the children of the state and that such protection in the field of motion pictures cannot be accorded without precensorship.''[13]

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[10] *Matter of Kingsley Corp.* v. *Regents,* 4 N.Y. 2d 349, — N.E. 2d —, — N.Y.S. 2d — (1958).

[11] *Id.* at 354.

[12] *Id.* at 351.

[13] N. Y. UNCONSOL. LAWS (McKinney 1954) — Governor's memorandum on approval of L. 1954 C. 620.

Arguments Against Precensorship

With these strong arguments which militate in favor of precensorship of films, what are the arguments against precensorship? One argument not frequently put in such terms is the one that the motion picture industry is being denied equal protection of the law. This point, as outlined by a writer in the Harvard Law Review, takes the tack that the motion picture industry ought not to be discriminated against in relation to books, newspapers, the legitimate stage, or television.[14] As stated in a slightly different form by Justice Fuld's dissent in the *Lady Chatterly's Lover* case, ''The constitution protects all expression and is limited neither by the thoughts put forth nor by the medium employed. It protects the transmission of ideas and beliefs, whether . . . uttered in the street, a public theatre (with actors live or on a screen) and to words written in newspapers, books or motion picture subtitles.''[15]

Another reason urged for abolishing precensorship is that there is no real danger in allowing all pictures to be shown. As Professor Chafee puts it, ''Are not grown men and women to be trusted to tell bad from good when it is in plain sight? Why is it dangerous for them to witness on the screen the great problems which they are accustomed to find in the writings of Tolstoy or Eugene O'Neill or Shakespeare without apparently going to the dogs in the consequence.''[16]

Another reason advanced for discontinuing censorship is that it is essentially undemocratic. As Judge Hill (dissent) expressed it in *Matter of Foy Productions Ltd.* v. *Graves,* the question of whether we should have censorship or not in this case ''. . . presents the issue of whether our people may govern themselves or be governed. . . .''[17] He further likens the censor to a minister of propaganda when he states that ''ministers of propaganda are favored in certain jurisdictions, but agencies of that kind never have been approved here.''[18] It must be pointed out that Judge Hill was not arguing for *absolute* abolishment of censorship, but this is one of the arguments frequently advanced in that cause. The point made is that democracy is built upon the theory that in a free interchange of ideas the truth will prevail and endure; therefore suppression of opinion obstructs the democratic process.

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[14] 71 Harv. L. Rev. 334.

[15] *Matter of Kingsley Corp.* v. *Regents,* 4 N.Y. 2d 349, 374, — N.E. 2d —, — N.Y.S. 2d — (1958).

[16] Chafee, *Free Speech in the United States* 543 (1948).

None of the foregoing objections meet squarely the issue of protecting the children of the state from deleterious influences. One approach to this problem is that censorship serves no useful purpose in respect to this matter. First of all, the attempt to isolate them from these influences is ineffective. As one writer has put it: ''When the tide of sexual energy is at adolescent flood, any stimulus can serve, or suitable ones can be invented. . . .''[19] This situation is not unlike that which Professor Watson aludes to when he points out that by ''[i]nside dope, by quiet word of mouth from another child may quite possibly undermine all the public propaganda from parents and department stores about Santa Claus.''[20] Secondly, protection of this sort is undesirable because ''Protection by censorship might leave such children weaker and more susceptible; some of their childhood interests like measles contribute to later life a useful immunity.''[21] Judge Bok in a leading case on book censorship expressed a somewhat similar attitude when he said, ''I should prefer that my own three daughters meet the facts of life and the literature of the world in my library than behind a neighbor's barn, for I can face the adversary there directly. . . . [W]e should be willing to prefer their deliberate and informed choice of decency rather than an innocence that continues to spring from ignorance.''[22] It must be admitted that Judge Bok was arguing for a liberal guide to censorship rather than its abolition. Nevertheless, the same arguments have been applied to the latter course, i.e. abolition of precensorship.

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[17] 253 App. Div. 475, 483, 3 N.Y.S. 2d 573, 580 (3rd dept. 1938).

[18] *Ibid.*

[19] Watson, 5 *Social Meaning of Legal Concepts* 84.

[20] *Id.* at 77.

[21] *Ibid.*

Professor Chafee warns against reducing the subject matter of motion pictures to the ''level of a twelve-year old child.''[23] He maintains that the disciplining of children should be left to their parents and the statutes (cf. N. Y. Penal Law § 484)[24] regulating children's attendance at motion picture theatres. He feels that this is necessary to ''let adults chew occasionally on intellectual and artistic nourishment too tough for milk teeth.''[25]

Just as it is argued that censorship is ineffective to protect children so too is the same argument applicable in respect to adults. As Professor Watson points out, ''Actually censorship rarely succeeds in its efforts to keep the disapproved material out of circulation. . . . 'Every censorship' according to Harold Lasswell, 'produces a technique of evasion as well as a technique of administration.' We take pride in the success with which during the recent war our side operated secret printing presses and radios right under the noses of the determined and ruthlessly efficient Nazis.''[26] Forbidden fruits are sweet and a person so inclined may often conjure in his own mind a replacement for the excised sentence or scene much more obscene than the one created by the original author. Not only that, but censorship in one state may be advertising fodder in another. A recent movie advertisement stated in bold letters that one should see "God's Little Acre" because it was the "most censored movie" ever produced. "Stamping on a fire often spreads the sparks."[27]

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[22] *Commonwealth* v. *Gordon,* 66 D. & C. 101, —, (1949).

[23] Chafee, *Free Speech in the United States* p. 543.

[24] It is a misdemeaner to admit or allow to remain at a moving picture performance "any child actually or apparently under the age of sixteen years unless accompanied by its parent or guardian or by an adult person authorized by its parent or guardian."

[25] Chafee, *Free Speech in the United States* p. 543.

[26] 5 *Social Meaning of Legal Concepts* p. 76.

One of the objections that is most frequently made to censorship is the incompetence and warped nature of the "typical censor." This impression dates back at least as far as the Roman, Cato, who went down in infamy as the great censor. Modern day theorists, however, still tell us that "The paranoid personality is naturally drawn to agencies which are supposed to ferret out and to suppress threats to order and propriety."[28] The modern censor may deserve better treatment. In New York (1957), for example, a member of the board of censors is required to be a college graduate with proficiency in at least one foreign language. He is covered by civil service and earns in excess of $6,000.[29] Many people level a different charge at New York's censors, i.e. they are too responsive to powerful orthodoxies. Their favorite example is the licensing and later revocation of a license to show the film "The Miracle" on the grounds of its being sacrilegious. There are those who feel that censors ought to be responsive to public pressures or ought not to license pictures offensive to a substantial segment of the community. The Supreme Court has eliminated much of this responsiveness and obviated much of the objection of "abuse of discretion" by its insistence upon a narrowly and explicitly defined statute.

This brings us back to the question of due process. Many of censorship's greatest opponents insist that the requirements of due process cannot be met by the censorship statutes. They insist that the factual situations of each picture require an "interpretation" by the censor to determine if it comes within the prohibition of the statute. There, they point out, is the fly in the ointment. Dean Landis put it this way:

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[27] Chafee, *Free Speech in the United States* p. 215.

[28] 5 *Social Meaning of Legal Concepts* 80.

[29] 71 Harv. L. Rev. 329.

> ''The effort of censorship in this instance is obviously to protect the public from certain evils. But when we come to pin these evils down and particularize them, they tend frequently to elude our grasp. The statutory standards that the censors are called upon to apply speak always in generalities. They speak of 'obscenity,' 'indecency,' 'immorality' and the 'corruption of public morals,' language that can close and open like an umbrella, depending on whether the particular individuals involved choose to make it so. Obviously no one wants our moving picture theatres to portray obscene and immoral actions, but the dividing lines, in the spectrum between decency and indecency, morality and immorality, are seen differently by people of different religious, social and educational backgrounds. The results in many cases have been ridiculous . . . [citing various examples of censorship including the banning of ''Carmen'' because girls smoked cigarettes in public in it].''[30]

The Courts Positions In Non-Political Matters Of Censorship

From the beginning courts have recognized that the ''protection [of free speech] even as to previous restraint is not absolutely unlimited.''[31] There is some point beyond which free speech will not protect an utterance from censorship. One of the classic examples of this was stated by Justice Holmes: ''The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.''[32]

The decisions of censors and courts in individual cases have often been incomprehensible. A motion picture censor in Pennsylvania made a ruling that he would license ''no kiss over five feet long.''[33] In New York it was decided by the appellate division that although the dominant effect of a picture taken as a whole was not obscene, ". . . by the statute a license is to be refused if a part of the film is objectionable."[34]

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[30] 5 *Social Meaning of Legal Concepts* p. 2–3.

[31] *Near* v. *Minnesota,* 283 U.S. 697, 716 (1930).

[32] *Schenck* v. *United States,* 249 U.S. 47, 52 (1919).

[33] Chafee, *Free Speech in the United States* p. 543.

The New York Board of Regents has consistently examined movies with a consideration to its effect upon the children of the state. In one case they said, "Are we to present all this to our boys and girls in the theatres where they go seeking amusement?"[35] In the same case the Board cited with approval §7 of the *Production Code of Motion Picture Association of America:* "Sex hygiene and venereal disease are not subjects for theatrical motion pictures."

The courts on the other hand appear to have been slowly adopting a more liberal course. In 1938 the appellate division banned "Tomorrow's Children" because it ". . . publicizes and illucidates sterilization as a means to prevent the conception of children, that it is a form of birth control, contraception without penalty, and that it is [self proclaimed as] 'an immoral means to a desirable end' [the picture was concerned with the sterilization of those persons possessed of inheritable feeblemindedness]".[36] The court decided that the picture was within the prohibition of the EDUCATION LAW §122 in that it was "immoral" and would "tend to corrupt morals."[37] A year later the court upheld the Board of Regents' refusal to grant a license for another picture on the same grounds.[38] This picture concerned the adultery of a wife whose husband was impotent due to an auto accident. The husband commits suicide in the hope that it will contribute to her happiness. When she realizes the wrongfulness of her behavior, she decides to revere and respect the memory of her deceased husband. Despite this ending the court upheld a determination that her actions were "immoral" and "would tend to corrupt morals."[39] This conservative attitude of the courts took a giant step toward liberalization when the U. S. Supreme Court reversed the New York Court of Appeals in the *"La Ronde"* case.[40] The court of appeals upheld a refusal to issue a license because the picture was "immoral" and "would tend to corrupt morals." This picture appears to be much more extreme in its presentation than either "Tomorrow's Children"[41] or the picture involved in the *Commercial Pictures*[42] case. "La Ronde" deals with a series of acts of sexual intercourse, one of the partners from each act, taking part in the subsequent act. There seems to be no redeeming feature to this movie in its ending or otherwise. Judge Desmond describes the theme as "everyone is sexually promiscuous, and that life is just a 'round' of sexual promiscuity."[43] The Supreme Court reversed, without opinion, in this case on the authority of *Burstyn* v. *Wilson,* 343 U.S. 495. The *Burstyn* case was decided on two major grounds, i.e. (1) moving pictures come within the protection of the first amendment and, (2) the term "sacrilegious" is unconstitutionally vague. Since the Supreme Court gave no opinion in the *"La Ronde"* case, it is difficult to determine whether the statute infringes freedom of speech or whether the term "immoral" is unconstitutionally vague. Justice Douglas (with whom Justice Black agreed) in his concurring opinion indicates that any censorship law, no matter how clearly defined, would be unconstitutional.[44] The court, however, has heretofore been unwilling to take that step (cf. *Burstyn* v. *Wilson,* 343 U.S. 495, 505–506).

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[34] *Matter of Eureka Production, Inc.* v. *Byrne,* 252 App. Div. 355, 357, 300 N.Y. Supp. 218, 221 (3rd dep't. 1937).

[35] 71 *State Department Reports* 6, 7 (1950).

[36] *Matter of Foy Productions, Ltd.* v. *Graves,* 254 App. Div. 475, 480, 3 N.Y.S. 2d 573, 577 (3rd Dep't 1938) aff'd 278 N.Y. 498, 15 N.E. 2d 435.

[37] *Ibid.*

[38] *Matter of Mayer* v. *Byrne,* 256 App. Div. 431, 10 N.Y.S. 2d 794 (3rd dep't 1939).

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[39] *Ibid.*

[40] *Superior Films* v. *Department of Education,* 346 U.S. 587 (1953).

[41] *Matter of Foy Production Ltd.* v. *Graves,* 254 App. Div. 475, 3 N.Y.S. 2d 573 (3rd dep't 1938).

[42] *Matter of Mayer* v. *Byrne,* 256 App. Div. 431, 10 N.Y.S. 2d 794 (3rd dep't 1939).

[43] *Matter of Commercial Pictures* v. *Board of Regents,* 305 N.Y. 336, 349, — N.E. 2d —, — N.Y.S. 2d — (concurring opinion—1953).

As stated above, it was then that New York adopted EDUCATION LAW §122-a in an attempt to eliminate the objection of vagueness of the statute. But it is interesting to note that in the court of appeals consideration of the *Superior Films* case they stated that "[t]he Legislature has used the word immoral as meaning 'sexually immoral'."[45] The appellate division in *Matter of Broadway Angels* v. *Wilson* also followed the court of appeals in refusing to uphold the banning of "Broadway Angels."[46] The court said that since the picture dealt with drug addiction and not sexual immorality, it was not within the intent of the legislative prohibition. In *Holmby Productions* v. *Vaughn* a Kansas Court held that "obscene, indecent, immoral or such as tend to debase or corrupt morals . . . have an accepted, definite and clear meaning."[47] The Supreme Court reversed again without opinion[48] citing the *Burstyn*[49] and *Superior Films*[50] cases. The New York Court of Appeals was then called upon to determine whether a picture titled "Garden of Eden" might be refused a license on the grounds of its being "indecent." The court refused to sustain the denial of a license stating: "Since the constitution forbids any prior restraint of a motion picture which is not *obscene* [emphasis supplied] . . . and since nudity in itself

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[44] *Superior Films* v. *Department of Education,* 346 U.S. 587 (concurring opinion Justice Douglas 1953).

[45] *Matter of Commercial Pictures* v. *Board of Regents,* 305 N.Y. 336, 345, — N.E. 2d —, — N.Y.S. 2d — (1953).

[46] 282 App. Div. 643, 125 N.Y.S. 2d 546 (3rd dep't 1953).

[47] 282 P. 2d 412, 414, 177 Kan. 728 (1955).

[48] 350 U.S. 870.

[49] *Joseph Burstyn Inc.* v. *Wilson,* 343 U.S. 495 (1952).

[50] *Superior Films* v. *Department of Education,* 346 U.S. 587 (1953).

[story of a nudist colony] . . . is not obscenity in law or in common sense, the picture may not be banned.''[51]

It was against this background that the case concerning ''Lady Chatterly's Lover'' arose.[52] Denial by the Board of Regents of a license to show this picture was based ''largely upon the ground that the picture presents adultery as a desirable, acceptable, and proper pattern of behavior.''[53] The appellate division in reversing the decision of the Board of Regents said:

> ''Ordinarily such a word as 'immoral,' which might have one meaning to one person or group of persons and another meaning to another person or group of persons, cannot be defined with such exactness as would leave no field of individual opinion and discretion open to the viewer. Adding more adjectives or more words which are likewise open to different opinion helps little. . . . For instance, under Section 122-a, the censoring body must determine . . . what constitutes acts of sexual immorality perversion or lewdness.
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> As we interpret the decisions of the Supreme Court of the United States in the *Burstyn* case, the *Commercial Pictures* Case, and *Holmby Productions* v. *Vaughn* (350 U.S. 870), a statute which leaves any field open to the opinion, discretion or individual point of view of a censor in banning a moving picture, violates the Fourteenth Amendment.''[54]

The Board of Regents appealed to the New York Court of Appeals. Here, in view of the liberal trend, which I have sought to outline, it might have been expected that the court would take another step. In a five opinion decision, the court by a four to three vote, reversed the appellate division. It confirmed the determination of the Board of

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[51] *Matter of Excelsior Picture Corp.* v. *Regents,* 3 N.Y. 2d 237, 242, — N.E. 2d —, — N.Y.S. 2d — (1957).

[52] *Matter of Kingsley Corp.* v. *Regents,* 4 App. Div. 2d 348, 4 N.Y. 2d 349, — N.E. 2d —, — N.Y.S. 2d — (1958).

[53] *Id.* 4 App. Div. 2d 348, 349, — N.Y.S. 2d — (1958).

[54] *Ibid.*

Regents to refuse to license the film.[55] The opinion of Judge Conway (with whom Judge Froessel and Judge Burke concurred) might be analyzed as follows: It starts with the question (1) "What can society do about protecting itself from motion pictures which are corruptive of the public morals?"[56] (2) His answer is that it may, constitutionally, censor such material. He says this "with full confidence that our founding fathers never intended that our Federal Constitution be the altar upon which this state, and this nation must sacrifice themselves to the ravages of moral corruption."[57] (3) Judge Conway next asserts that it may accomplish this constitutional aim by prohibiting the exhibition of films which "are immoral in that they portray acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior."[58] (4) He maintains that "[t]his standard leaves no area of judgment or speculation open to the Regents in which they might arrive at personal judgments as to what constitutes immorality. Their sole function under the statute is the fact-finding function as to whether a particular motion picture portrays acts of sexual immorality as proper behavior."[59] (5) He further maintains that since this picture presents adultery as a proper pattern of behavior it is immoral "as measured by the standards of our community. . . . [T]he Legislature specifically designated such a motion picture as immoral, and the determination by the Regents was mandated by statute. Indeed, adultery has been decreed to be immoral since Moses received the Commandments on Mount Sinai."[60] (6) He concludes that "[t]here is nothing extreme about refusing a license to films which alluringly portray acts of sexual immorality by adultery as proper behavior. . . . To those who fear possible unnecessary extensions of this remedy, we reply that this court is competent to define the permissible scope of motion picture licensing and to safeguard constitutional liberties.''[61]

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[55] *Id.* at 4 N.Y. 2d 349, — N.E. 2d —, — N.Y.S. 2d —.

[56] *Id.* at p. 358.

[57] *Ibid.*

[58] *Id.* at 351.

[59] *Id.* at 355.

[60] *Id.* at 354–355.

Judge Desmond, whose vote was determinative in reversing the appelate division, does not take quite as positive a position. His primary theme is a voice for moderation. His uncertainty as to the constitutionality of the statute is revealed when he says, ''I confess doubt as to the validity of such a statute but I do not know how that doubt can be resolved unless we reverse here and let the Supreme Court have the final say.''[62]

Judges Dye and Fuld disagree with Judge Desmond's major premise as I have outlined it above. They do not agree that moving pictures present a problem to be distinguished from other media of communication. Judge Dye says, ''A motion picture should not be singled out as a subject for prior restraint under the beneficent guise of regulating community mores, any more than the prior censorship of press, books, the theatre or other media of communication which, as we know, includes the motion picture.''[63] In this connection Judge Fuld writes, ''[w]ere we dealing with newspapers, books or with a stage play, there could be no question as to the unconstitutionality of the statute under consideration, and I perceive no basis for distingiushing between such forms of expression and a moving picture.''[64] Apparently Judge Dye would not agree that ''our founding fathers'' would have consented to this type of ''morals'' censorship or that it is without the intent of the First amendment for he says ''[c]ensorship under such a guise is a type of paternalism that lends itself to the whim and caprice of the administrator. Whenever tested, censorship of motion picture film in advance has been disapproved.''[65]

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[61] *Id.* at 364.

[62] *Id.* (concurring opinion Judge Desmond) at 369.

[63] *Id.* (dissenting opinion Judge Dye) at 372.

[64] *Id.* (dissenting opinion Judge Fuld) at 374.

Neither does Judge Dye agree that the censor is adequately confined by the admonition in §122-a EDUCATION LAW to consider only ''acts of sexual immorality.'' He maintains that ''the term 'immoral' as used in section 122 [declared unconstitutional][66] has not been clarified by the amendment. It is still vague and indefinite. When the censor relies on the term 'immoral' as a basis for prior restraint, he necessarily must resort to his own notion of its meaning, since the statute itself provides no test or standards to guide him in the exercise of his discretion.''[67] He concludes: ''. . . the essential particulars of section 122 have been deemed too indefinite to satisfy fundamental essentials of statutory validity, and these deficiencies have not been cured or supplied by anything contained in subdivision 1 of section 122-a.''[68]

Between the majority opinions, the dissenting opinions and the appellate division decisions in this case, nearly all that could be said about this case has been said. At the printing of this paper, the author is informed that the case is being taken to the U. S. Supreme Court. Its decision should prove to be of great interest.

What Would Happen If All Censorship Were Abolished?

As a result of a Supreme Court decision in the *Lady Chatterly's Lover* case,[69] in combination with similar decisions, it is conceivable that all state precensorship of motion pictures may cease. It is also possible that the state legislatures may abolish these statutes. What would be the result of such a change?

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[65] *Id.* (dissenting opinion Judge Dye) at 372.

[66] *Superior Films* v. *Department of Education,* 346 U.S. 587 (1953).

[67] *Matter of Kingsley Corp.* v. *Regents,* 4 N.Y. 2d 349, 371, — N.E. 2d —, — N.Y.S. 2d — (1958).

[68] *Id.* at 372.

[69] *Matter of Kingsley Corp.* v. *Regents,* 4 N.Y. 2d 349, — N.E. 2d —, — N.Y.S. 2d — (1958).

Post publication censorship, as applied to books, etc. would remain. We would then have a jury to determine whether a person is guilty of a misdemeanor in issuing an obscene publication (cf. New York Penal Law § 22-a). We might have the exhibitor of a picture subjected to a suit to enjoin the showing of a motion picture "of an indecent character, which is obscene . . . or which contains an article or instrument of indecent or immoral use . . . or purpose."[70] Dean Landis seems convinced that jury trials are the best available remedy when he states that ". . . jury determinations as distinguished from administrative judgments are a surer safeguard of the liberties of the private citizen. . . . It is in juries that we have found again and again protection against the unjustified encroachment of government. . . ."[71] But query, would not the same questions of free speech and procedural due process apply here, as were applied in the instance of precensorship cases? Furthermore, is it better to in effect forbid expression of opinion after it has once been expressed, than before it has ever been expressed?

Let us suppose that even post-publication censorship were abolished. What could we expect then? Professor Watson seems confident that the result would not be chaos. He says "[s]ome excesses may be expected in the first reaction to liberation" but in the long run "[p]eople treated as if they were able to decide wisely for themselves become so."[72] Professor Chafee appears to have shared that view when he wrote, "[i]t would seem that the informal control by audiences would be sufficient in view of their power by voluntary boycotts to ruin both the producer and the theatre if really objectionable pictures are forced on them.''[73] The prospect of a completely unfettered motion picture industry is still a distant possibility, but it is nevertheless interesting to ponder the significance of such a possible change.

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[70] N. Y. CODE OF CRIMINAL PROCEDURE § 22-a.

[71] 5 *Social Meaning of Legal Concepts* 14–15.

[72] *Id.* at 85.

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[73] Chafee, *Free Speech in the United States,* p. 543.

DONALD F. REINER

Recent Decisions

BILLS AND NOTES — DEFECT IN PLAINTIFF'S TITLE AS A DEFENSE AVAILABLE TO THE DRAWER BANK

A recent three to two decision by the appellate division, in the case of *International Firearms Co. v. Kingston Trust Co.,* 6 App. Div. 2d 171, 175 N.Y.S.2d 794 (1958), points out an interesting and unsettled problem in the law of negotiable instruments. If the remitter of a bank draft imposes a condition of delivery that is not apparent on the face of the draft, and the payee acquires possession without performing the condition, can the remitter stop payment of the draft with the agreement of the drawer, or must the remitter sue the payee for a breach of his contract? This case held that the remitter and the drawer may mutually rescind their contract, thus stopping payment, and that the payee's defective title is a defense available to the drawer bank when the payee sues upon the instrument.

The controversy arose from the following panorama of facts. Sportsmen's Wholesale Supply, of Montreal, Canada, agreed to sell and Martin B. Retting, of West Hurley, N.Y., agreed to buy $7,750 worth of Colt Revolvers. The seller required a deposit of $1,000 to be placed with the Royal Bank of Canada, before processing the order. Retting then purchased from the defendant bank a $1,000 bank draft drawn upon the Federal Reserve Bank of New York payable to Sportsmen's Wholesale Supply. The remitter, Retting, then sent a letter to the Royal Bank, along with the draft, stating that the draft was not to be delivered to the payee until the goods had been cleared through the United States Customs.

Differences arose between the parties and the goods were never cleared through customs. The purchaser complained of a delay in the shipment and the seller contended that the delay was occasioned by the purchaser's failure to complete the forms required for customs clearance.

The remitter demanded return of the draft from the Royal Bank which was refused. The drawer bank, on the remitter's request, ordered the drawee to stop payment of the draft. After requiring an indemnity agreement from the remitter, the drawer returned the amount of the draft. The remitter subsequently moved to California, leaving no property within this jurisdiction.

The plaintiff, a Canadian corporation and successor to the interest of the Sportsmen's Wholesale Supply, acquired title to and possession of the draft through a decree, of an in rem action in Canada, which cancelled the sale and awarded the draft to plaintiff in lieu of damages. The judgment recites no service of process on either Retting or the defendant. No such service was claimed.

In the foregoing synopsis of the facts several have been added that are not apparent from the court's opinion. These were taken from the briefs of counsel on file with the court and were not contested.

The majority opinion written by Justice Bergan, and concurred in by Justices Foster and Reynolds commented upon the above facts as follows: "Here it could be found that the plaintiff is not a bona fide holder; that it has obtained possession of the draft in violation of the specific conditions, to which its predecessor in title had agreed, under which it was delivered to the Royal Bank as stockholder. The in rem judgment to which defendant was not a party is not an adjudication which, as against defendant, converts plaintiff's wrong into a good faith possession of the paper." 6 App. Div. 2d 171, 173, 175 N.Y.S.2d 794, 797 (1958).

Plaintiff contended that the defense was personal to the remitter and was therefore not available to the drawer in an action upon the draft. Plaintiff depended solely upon its contention that the drawer had an absolute liability to pay its obligation, evidenced by the draft, and that defenses arising from the equities between the remitter and the payee were not available to the drawer.

If there had been no rescission, plaintiff's position would be strong; because the draft never left the hands of the payee, except to his successor in interest, and there could be no conflicting claims upon the instrument. Plaintiff still claims the strength of this position by contending that rescission by the remitter and the drawer is impossible.

Solution to this controversy, of course, depends upon the legal status of the remitter as well as the status of the parties within the tenor of the instrument. In light of the enormous volume of money transferred daily by negotiable instruments and the sheer numerical volume of transactions in which they are involved, one would think that every possible issue would be well litigated and decisional case law would be voluminous upon this subject. Few cases are to be found on this point. Case law would seem unnecessary in view of the multitude of statutory provisions contained in the NEW YORK NEGOTIABLE INSTRUMENTS LAW. BRITTON, BILLS AND NOTES states on page 299 that "The Negotiable Instruments Law contains no provision which expressly deals with the status of a remitter. . . ." Without the express guidance of statutes or case law we are left to devise our own analysis, looking for support where it can be found.

The nature of the transaction between the remitter and the drawer of the bank draft has been analyzed by two different methods. They lead to conflicting conclusions as to the available defenses of the drawer bank.

The first method views the transaction as a purchase and sale of the bank's credit. The contract is complete upon delivery of the draft to the remitter. The drawer has sold his unconditional promise to pay the payee and is under no obligation to return the money to the remitter. The logic of this view demands that the bank has only to pay the holder of the instrument upon presentment and thereby discharge the instrument. Support for this analysis is found in the NEW YORK NEGOTIABLE INSTRUMENTS LAW, §111, and the broad language used by the court of appeals in the case of *Kerr S.S. Co. v. Chartered Bank of India,* 292 N.Y. 253, 54 N.E.2d 813 (1944).

That section of the NEW YORK NEGOTIABLE INSTRUMENTS LAW relied upon for this argument is §111, which states: "The drawer by drawing the instrument . . . engages that on due presentment the instrument will be accepted and paid . . . according to its tenor, and that . . . on dishonor . . . he will pay the amount thereof to the holder, ..."

In the *Kerr* case the remitter of the draft elected to rescind and the court of appeals upheld the bank's right to refuse to return the money. The court stated broadly that "The transfer or delivery of the instrument to 'the purchaser' even though the purchaser is not the payee, completes the contract, integrated in the instrument and the contract is no longer revocable." *Kerr S.S. Co. v. Chartered Bank of India,* 292 N.Y. 253, 261, 54 N.E.2d 813, 816 (1944).

The second method of analysis characterizes the transaction as an indorsement or a guaranty of the purchaser's, or remitter's, credit, up to the amount of the draft. Section 97 of the NEW YORK NEGOTIABLE INSTRUMENTS LAW supports this viewpoint in that a negotiable instrument is subject to the same defenses as a non-negotiable instrument while in the hands of a holder other than a holder in due course. A person taking the instrument with knowledge of its defects can not be a holder in due course. The logic of this second view allows the drawer to set up a defense arising out of the equities of the transaction between the remitter and the payee, but the first view will not admit this since the remitter is not a party within the tenor of the negotiable instrument.

The weakness of the first theory, relied on by the plaintiff, is its reliance upon the point that the contract between the remitter and the drawer *cannot* be rescinded. The *Kerr* case, restricted to its facts, holds no more than that the drawer has no obligation to rescind. The remitter cannot force a rescission, but what if the drawer agrees to a rescission, as in the principal case? As a contract relation, the parties to it can mutually rescind. The difficulty arises when the drawer does not demand return of the draft at the time of the rescission. This is the problem confronting the court in the case under discussion.

The majority opinion used the language and terminology of the plaintiff's argument, but negated its conclusion as follows: "Although a bank draft, purchased for a good consideration, is treated as a purchase of credit and of the bank's promise to pay, and is thus regarded to be contractually complete as between the purchaser and the bank and not revocable unilaterally by the bank as drawer, the party asserting a liability against the bank on the draft is required, at least, to show a valid legal title to it and a right to enforce the contractual obligation." 6 App. Div. 2d 171, 173, 175 N.Y.S.2d 794, 796 (1958).

The majority noted that their decision was consistent with *Hurley v. Union Trust Co.,* 244 App. Div. 590, 280 N.Y.S. 474 (1935). In that case the payee transferred the draft to the plaintiff in payment of a gambling debt. The payee was also the purchaser, or remitter, and he stopped payment of the draft by mutual agreement with the drawer bank. Since the gambling transaction could pass no title, (PENAL LAW §§991–993) plaintiff's title was void. The drawer bank was allowed this defect in plaintiff's title as a defense against plaintiff's suit to collect on the draft.

The dissenting opinions followed the theory advanced by the plaintiff and thought that §111 of the NEW YORK NEGOTIABLE INSTRUMENTS LAW was controlling. Justice Coon stated: "The defendant bank had nothing whatever to do with the merits of any controversy between Retting and plaintiff. It had nothing to do with the Canadian judgment It did have an absolute obligation to pay its draft upon presentment. To permit the drawer of a bank draft to stop payment upon the unilateral request of the purchaser, without the consent of the payee or the physical return of the draft, would completely destroy the usefulness of a bank draft as a means of safe transmittal of cash. If payment could be stopped in this manner, a bank draft would be no more acceptable in commerce than a personal check, although for years, in commercial and banking circles, it has been an established custom to treat a bank draft as the equivalent of cash." 6 App. Div. 2d 171, 175, 175 N.Y.S.2d 794, 799 (1958).

Justice Herlihy, who concurred with Justice Coon, stated in his separate dissenting memorandum that ". . . unless there be restrictions or limitations upon the face thereof or by way of indorsement, the payee is entitled to payment absolute upon its presentation to the bank." This argument concludes that to rule otherwise will relegate a bank draft to "... little more significance than an ordinary check." 6 App. Div. 171, 176, 175 N.Y.S.2d 794, 799 (1958).

I do not believe the result of the present case can justify the fear that bank drafts will lose their character of cash, when the ramifications of the majority's opinion are followed through. Since the instrument is negotiable, the drawer is still liable to a holder in due course, but what of his liability to other holders? The *Hurley* case allows the defense of a void transaction between the remitter and the plaintiff and the present case, going one step further, allows the defense of a voidable transaction—to the extent of a faulty delivery—between the remitter and the plaintiff.

Before a rescission, no defect in plaintiff's title arising out of the transaction between the remitter and payee is available as a defense to the drawer and after a rescission the defective title is not available against a holder in due course. Thus the instrument still partakes of the character of cash in the hands of a holder in due course and this is all that is relied upon by the commercial and banking public.

This result is fair and reasonable since the innocent purchaser for value is protected but the holder with knowledge of the defect in the draft is thwarted.

B. S. A.

CONFESSIONS — ADMISSIBILITY IN EVIDENCE WHEN VOLUNTARILY MADE DURING ILLEGAL DETENTION

The rule as to the admissibility of confessions made by a defendant to police officers while he is being illegally detained before his arraignment has long been settled in New York State. In the case of a confession obtained by means of physical or psychological brutality or coercion by police officers or the district attorney the rule has been that they are not admissible. As stated in *People v. Valletutti,* 297 N.Y. 226, 231, 78 N.E.2d 485, 487 (1948), " . . . an involuntary 'confession,' is, by its very nature, evidence of nothing." However, the other phase of the problem, where the confession is made during the course of an illegal detention, and is voluntary, presents vexing considerations. In the past the New York courts have found no trouble in saying that the mere fact that the confession is made during the course of an illegal detention by police officers does not make the confession invalid. In *Balbo v. People,* 80 N.Y. 484, 499 (1880), the court said, "The confession if voluntary is admissible whether made to an officer or private person. The fact that the arrest was illegal has no relevancy. . . ." In *People* v. *Trybus,* 219 N.Y. 18, 113 N.E. 558 (1916), the court condemned the conduct of detectives in holding suspected persons in custody before formal complaint was lodged against them in order to obtain incriminating statements from them before they could see counsel and friends. However, the reception of statements thus made is not illegal as a matter of law, although the circumstances are to be considered by the jury on the question of involuntariness. In *People v. Mummiani,* 258 N.Y. 384, 396, 180 N.E. 94, 95 (1932), it was stated that, "Disregard of the duty of arraignment does not avail, however, without more to invalidate an intermediate confession."

In spite of the apparent conclusion that these, and other cases, have settled the New York rule, in two recent decisions the court of appeals experienced difficulties with it. In *People v. Spano,* 4 N.Y.2d 256, 152 N.E.2d 657, 173 N.Y.S.2d 793 (1958), the decision affirmed the rule, but three judges dissented. In *People v. Scully,* 4 N.Y.2d 453, — N.E.2d —, 176 N.Y.S.2d 300 (1958), the court, while holding the confession to be admissible, based its decision on the conclusion that the detention of the defendant was not in fact illegal, instead of basing it on the apparently settled rule of law as expressed in the cases cited above.

In the *Spano* case, the defendant surrendered voluntarily to the New York city police for the murder of one Palermo. Prior to his surrender the defendant had talked to his attorney and was advised to divulge to the police officers nothing more than his name. The police arrested the defendant pursuant to a bench warrant issued upon an indictment earlier found by the grand jury. As required by the CODE OF CRIMINAL PROCEDURE, § 301, the bench warrant "commanded the arresting officer forthwith to arrest the [defendant] and bring him before [the] court . . . to answer the indictment; or if the court have adjourned for the term . . . [to] deliver him into the custody of the warden of the city prison of the City of New York." 4 N.Y.2d 256, 260, 152 N.E.2d 657, 173 N.Y.S.2d 793, 795 (1958). Instead of complying with the command of the bench warrant, the officers took the defendant to the assistant district attorney's office and there questioned him for five hours. Then they took defendant to the police headquarters and questioned him for another three hours until he confessed. It was clear on the record and undisputed by the parties that the confession was wholly voluntary and was not exacted by means of force or threats of any kind. Upon these facts, the defendant contended that the confession was invalid and inadmissible as evidence on his trial. He asserted that the confession was invalid by reason of its being made while he was being detained in violation of the command of the bench warrant, and that its admission was violative of his right against being made to testify against himself.

The majority of the court had no trouble in deciding,

"Even if we concede to defendant that his detention was in violation of law it would not avail him here. By a long and uninterrupted line of decisions in this State it has been made indisputably plain that a confession is not vitiated solely because it has been procured during a delay in arraignment or unlawful detention." 4 N.Y.2d 256, 260, 152 N.E.2d 657, 173 N.Y.S.2d 793, 796 (1958). The court pointed out that by the CODE OF CRIMINAL PROCEDURE, § 395, a confession is admissible unless involuntarily made under the influence of fear produced by threats or under a promise of immunity by the district attorney. While the majority considered it unnecessary to pursue the question any further, because of the pressure of the minority view, they went on to explain that (1) there was a question as to whether the detention was in fact illegal and (2) that the defendant had not been forced to testify against himself because that privilege applies only to cases where incriminatory disclosures have been extorted by constraint of legal process directed against a witness. *People v. Defore,* 242 N.Y. 13, 150 N.E. 585 (1926); *Adams v. New York,* 192 U.S. 585 (1903).

The minority felt that this case carried the present rule too far. In essence they said that since an indictment had been returned against the defendant and the defendant had voluntarily surrendered, the period of investigation had ceased and the judicial process had commenced. The defendant was no longer in the position of a suspect, but rather in the position of one accused of crime. This being so, no officer had the right to interrogate this defendant.

Apparently the dissenting judges were in accord with the federal rule, which is definitely contrary to the New York rule, for the tenor of their reasoning sounds very much like the justifications set forth for the rule as declared by the United States Supreme Court. The federal rule is that confessions made during an illegal detention are inadmissible. *McNabb v. United States,* 318 U.S. 332 (1942); *Upshaw v. United States,* 335 U.S. 410 (1948); *Mallory v. United States,* 345 U.S. 449 (1952). This rule is a result of judicial interpretation of Rule 5(a) of THE FEDERAL RULES OF CRIMINAL PROCEDURE, which reads very much like the command to the arresting officer contained in the bench warrant which ordered Spano's arrest, and does not rest on any express legislation. *Upshaw v. United States, supra; Stein v. New York,* 346 U.S. 156 (1952). The rule is established wholly aside from constitutional considerations such as due process and the right against self incrimination, and, therefore, it is not controlling on the state courts. *McNabb v. United States, supra; Stein v. New York, supra.*

In the *Scully* case, the defendant was brought to police headquarters for questioning at about 1:30 A.M., when he said he would like to tell all, but he did not want to get another fellow involved. Sometime between 11:00 A.M. and noon that day, he finally made a full confession, after which he was formally placed under arrest. Although the arraigning court was open that day, the defendant was not arraigned until the following day. Appealing from his conviction, the defendant contended that the court's refusal to charge that the delay in arraignment was unnecessary as a matter of law and had a substantial bearing on whether the confession was voluntary, constituted reversible error. The court held:

''Notwithstanding the delay in arraignment . . . violated the provisions of section 165 of the Code of Criminal Procedure, it is clear that defendant's confession was not made during the period of illegal detention. The defendant did not testify. There is no evidence in this record suggesting that the confession was a product of coercion, threats or beatings, or in any other wise indicating that the unlawful detention had any bearing on the securing of the confession. The illegality of defendant's detention does not retroactively change the circumstances under which he made the disclosures.'' 4 N.Y.2d 453, 455, — N.E.2d —, 176 N.Y.S.2d 300, 301 (1958).

In earlier cases the courts decided that a mere illegal detention did not render a confession invalid, and that the important issue was not the question, ''was the detention illegal?'' but rather the question, ''was the confession involuntary and exacted by means of coercion by the police officers?'' In this case, however, there is an implication that illegality of the detention is an important consideration. While the court was able to avoid this problem in reaching their decision, yet a possible inference from the case is that now the New York courts would be more willing than they were in the past to entertain a question as to the illegality of the detention as a major issue in deciding whether a confession is admissible or not.

Perhaps the strong dissent in the *Spano* case and the inference in the *Scully* case that the confession might have been invalid if the detention had been illegal are an indication that there is a drifting away from the traditional New York rule toward the more rigorous federal rule of admissibility. The very fact of the strong dissent on the one hand, and the avoidance of the issue as to the illegality of the detention on the other, suggests a process of change in the New York rule, and certainly is an indication that the rule is not as well settled as an analysis of previous cases would suggest.

A.R.P.

CONSTITUTIONAL LAW — VALIDITY OF ORDINANCE REQUIRING THREE YEAR CONFORMITY OR CESSATION OF NONCONFORMING USE

Matter of Harbison was a recent decision which, in the language of the dissenting opinion, " . . . marks, in my view, the beginning of the end of the constitutional protection of property rights in this State in pre-existing nonconforming uses under zoning ordinances." *Matter of Harbison v. City of Buffalo,* 4 N. Y. 2d 553, 564, 152 N. E. 2d 42, 48, 176 N.Y.S. 2d 598, 606 (1958). There, in a 4–3 split decision, the court held, per Froessel, J., that the right of a land owner to continue a prior nonconforming use may be terminated after a reasonable period, provided the period allowed affords the owner an opportunity to amortize his investment and make plans for the future. *Matter of Harbison v. City of Buffalo,* 4 N. Y. 2d 553, 152 N. E. 2d 42, 176 N.Y.S. 2d 598 (1958).

Petitioners sought relief from a refusal of the city to issue renewal licenses to them in 1956 upon the ground that their premises were within an area zoned as an "R3" dwelling district, within which the operation of a junk yard was prohibited.

Petitioners had, in 1924, established a cooperage business on what was then an unpaved extension of an existing street in the City of Buffalo. There was at that time in the area a city operated dump and a glue factory, both of which are now gone. Residences adjoin both sides of petitioners property and are situated across the street. The volume of petitioners' business is stated to be the same now as it was in 1924, and the only difference appears to be that they now recondition used steel barrels rather than wooden drums. No issue of that distinction is raised, and it appears to have been admitted by the pleadings that petitioners, at the direction of the city, spent $2,000 for the installation of a special sewage system as recently as 1950. Since 1926, with a brief interruption during the war years, the land has been zoned for residential use and is presently in an "R3" dwelling district. From 1936 through 1956, petitioners applied for and obtained a license to carry on their business, under an ordinance which included their operations under a definition of "junk dealers." Effective July 30, 1953, the ordinances of the City of Buffalo were amended to provide, in effect, that premises within certain classifications, including those of petitioners, must not be used as at present or must be changed to a conforming use within three years from the effective date of the ordinance. Accordingly, in 1956, petitioners were notified to cease the operation of their business at once. After the denial of their license application, they brought this proceeding in the nature of *mandamus* under N. Y. CIVIL PRACTICE ACT, ART. 78, in which an application was granted at special term for an order directing that a wholesale junk license be issued. The appellate division affirmed the order but modified it to the extent of directing that a statement providing, *inter alia*, that petitioners have a vested right to maintain and operate their business, be stricken. *Matter of Harbison v. City of Buffalo*, 4 App. Div. 2d 999, 169 N.Y.S. 2d 598 (1957).

The problem of zoning is a relatively new one, and the first court of appeals decision appears to have been rendered as late as 1920. In *Lincoln Trust Company v. Williams Building Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920) the proposition was broadly set forth that zoning ordinances are a proper exercise of police power and not an incumbrance upon real property. With the propriety of the very enactment of a zoning ordinance affirmatively settled, at least in New York, the stage was set for the decision which is almost universally regarded by courts and writers alike as establishing the constitutional basis for comprehensive urban zoning.

In *Village of Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926), the Supreme Court, in sustaining the validity of a village ordinance, held, in essence, that requirements excluding offensive businesses from residential areas were valid, despite the fact that some unoffensive businesses might thereby be barred, and that broad police power factors, such as public safety and the protection of children, justify upholding an exclusive residential zone. The Court recognized the fact that zoning, by its very nature, is not static, and the rationale of its decision seems to be based upon the reasoning that, in the light of complex modern conditions, requirements which years ago might have been held invalid should now be sustained.

The *Euclid* case realized that, with respect to the assertion of police power for the public welfare, the line which separates the legitimate from the illegitimate assumption of power is not always capable of precise delineation. The Court proposed the general rule that the validity of a particular ordinance may not be decided by an abstract consideration of that structure or use at which it is directed, but rather that it must be determined by a consideration of the structure or use in the light of locality and attendant circumstances.

In the light of this and subsequent decisions, the position now seems untenable that more precise rules than those set forth in the *Euclid* case may be formulated to aid in the solution of problems arising under the due process clause of the Constitution, and it seems reasonable to say that litigation resulting from the exercise of police power will be with us always. It is arguable to maintain that at least one municipality recognized this and attempted to interpret the necessarily broad decision of the *Euclid* case as a judicial fiat sanctioning the enactment of sweeping urban zoning ordinances. In 1928, the Supreme Court was again called upon to decide the constitutionality of an elaborate ordinance of the same general character as that presented in the *Euclid* case. In *Nectow v. City of Cambridge,* 277 U. S. 183 (1928), plaintiff attacked an ordinance, concededly constitutional in its general scope, upon the ground that, as specifically applied to him, it deprived him of his property without due process of law in violation of the fourteenth amendment. Agreeing with the Supreme Judicial Court of Massachusetts, the Supreme Court held that governmental power to interfere with private rights by zoning regulations is not unlimited, and restrictions which do not bear a substantial relation to the public health, safety, morals or general welfare may not be imposed. The ordinance was held to be unconstitutional as applied to plaintiff, and judgment dismissing his bill was reversed. While the *Nectow* case appears to stand on its own facts, and despite the fact that the ordinance in question was held unconstitutional, the opinion rendered is nevertheless indicative of the broad view taken of zoning ordinances by the Supreme Court in the first three decades of this century and declarative of its approbation of the creation of residential districts from which trade and business may be excluded.

Following decisions such as those rendered in the *Euclid* and *Nectow* cases, and as a direct result of urban expansion and increased zoning, the problem in litigation with respect to zoning ordinances became not one of their constitutionality, per se, since this aspect had been affirmatively adjudicated on both state and federal levels, but rather, the issues narrowed to focus upon the prior nonconforming use and the validity of ordinances which struck at the continued existence of such uses.

The question of definition of a prior nonconforming use or structure has not appeared to plague the courts to any great extent, and, for the purposes of the present analysis, either of two definitions seems satisfactory. An annotation, 114 A.L.R. 991, describes such use as:

> ". . . the use of a building or land that does not agree with the requirements of the use district in which it is situated."

Rhyne, MUNICIPAL LAW, § 32–36, 903 (1st Ed. 1957) proposes as a definition:

> ". . . a property use which existed lawfully at the effective date of a zoning ordinance, and has been continued since that time."

Judge Froessel begins the majority opinion of the *Harbison* case with a discussion of the out-of-state decisions relied upon by the appellant City of Buffalo. A review of the eleven cases cited leaves little doubt that the policy of the law is the elimination of nonconforming uses, and ordinances furthering this policy have almost uniformly been held valid, and not a taking without due process, provided a reasonable amortization period is allowed. Thus, *State ex rel. Dema Realty Company v. Jacoby,* 168 La. 752, 123 So. 314 (1929), which provided a one year amortization period for a drug store, *City of Los Angeles v. Gage,* 127 Cal. App. 2d 442, 274 P. 2d 34 (1954), allowing a five year amortization period for a plumbing establishment, and *Standard Oil Company v. City of Tallahassee,* 183 F. 2d 410 (5th Cir. 1950), *cert. denied* 340 U. S. 892, allowing an auto service station ten years in which to amortize, were held valid.

It has been the theory of the New York courts that constitutional requirements allow the owner of a nonconforming use a degree of protection. In accord with this theory, it was held in *Matter of 440 East 102d Street Corp. v. Murdock,* 285 N. Y. 298, 34 N. E. 2d 329 (1941), that zoning ordinances are to be strictly construed, since they are in derogation of common law rights. Again in a much later decision it was held that amendments to a zoning ordinance which removed the protection afforded to nonconforming "natural products" uses were unconstitutional insofar as they applied to defendants in that such amendments unreasonably deprived them of their "vested rights." *Town of Somers v. Camarco,* 308 N. Y. 537, 127 N. E. 2d 327 (1955).

While these cases apparently still stand as law, each having been decided upon its own peculiar facts, the tendency of the New York courts to reduce the degree of protection constitutionally provided to owners of a nonconforming use is apparent in such decisions as that rendered by the appellate division in 1938, in *Koeber v. Bedell,* 254 App. Div. 584, 3 N.Y.S. 2d 108 (1938). Judge Froessel, referring to this case in the *Harbison* majority opinion, says: ". . . even where the zoning authorities may not prohibit a prior nonconforming use, they may adopt regulations which restrict the right of the property owner to enlarge or extend the use or to rebuild or make alterations to the structures on the property . . ." (citations omitted) 4 N. Y. 2d 553, 559, 152 N. E. 2d 42, 45, 176 N.Y.S. 2d 598, 602.

In *People v. Miller,* 304 N. Y. 105, 106 N. E. 2d 34 (1952), the court of appeals in a unanimous decision set down as narrowly as possible the law of this state with reference to nonconforming uses. In the *Miller* case, which appears to be the leading New York case on the subject, as well as the "cornerstone" case of the *Harbison* decision, defendant kept pigeons as a hobby, and had, since 1945, harbored them on his property in a residential area in the Town of North Hempstead. In 1947, an amendment to the Town's building ordinance provided, *inter alia,* that no premises were to be used for the harboring of pigeons, except when authorized by the Board of Appeals. Defendant's conviction of a violation of this amendment was upheld, the court stating, in effect, that defendant's nonconforming use was not within that class of uses entitled to protection. Thus emerged the broad proposition that nonconforming uses or structures in existence when a zoning ordinance is passed are generally protected and will be permitted to continue, despite the conflicting provisions of the ordinance. However, in establishing the rule of the case, the court held further that enforcement of a zoning regulation against an already existing nonconforming use *will be sustained where the resulting loss to the property owner is relatively slight and insubstantial.* A primary consideration appears to be the presence or absence of expensive improvements, and the test finally set forth by the *Miller* case would seem to be: Would enforcement of the ordinance, by rendering valueless substantial improvements, cause serious financial harm to the property owner? If so, the prior nonconforming use or structure should be permitted to continue; if not, enforcement of the ordinance should be sustained.

The dissenting opinion in the *Harbison* case, citing with approval the appellate division, states: "Whatever the law may be in California or Florida or other jurisdictions, in this State, the rule is as stated in *People vs. Miller* (304 N. Y. 105, 107, 109), to-wit: 'It is the law of this State that nonconforming uses or structures, in existence when a zoning ordinance is enacted, are as a general rule, constitutionally protected and will be permitted to continue, notwithstanding the contrary provisions of the ordinance.' " 4 N. Y. 2d 553, 566, 152 N. E. 2d 42, 49, 176 N.Y.S. 2d 598, 608. Expressed, then, in the dissent is the feeling of the minority that the *Miller* case no longer be regarded as law.

The majority opinion in the *Harbison* case criticizes both lower courts for failing to consider the question of "whether the particular period prescribed by the ordinance was reasonable under the facts of this case." This criticism necessarily implies an affirmance of the *Miller* case, for, as Judge Froessel said: ". . . in that case [the *Miller* case] we decided that where the enforcement of an ordinance requiring the termination of a prior nonconforming use caused 'relatively slight and insubstantial' loss to the property owner, it would be constitutional." 4 N. Y. 2d 553, 563, 152 N. E. 2d 42, 47, 176 N.Y.S. 2d 598, 603, 604.

Can four justices vote for affirmance and three for reversal, each giving as his reason for so doing the same case?

This, although apparently paradoxical, seems to be the basis for the present split opinion, but a closer view of the *Miller* case tends to lead inevitably to the conclusion that Judge Froessel has correctly applied the test question of that case to the *Harbison* case, while the dissenting justices have based their reasoning, not upon the law as stated in the *Miller* case, but upon the broad, secondary proposition that nonconforming uses in existence when a zoning ordinance is enacted will, generally, be accorded constitutional protection.

That the ultimate decision of an issue falling within the purview of the test set forth in the *Miller* case is one of fact, and not law, seems clear. To determine whether or not, in the language of that case, ''. . . enforcement of the ordinance would, by rendering valueless substantial improvements or businesses built up over the years, cause serious financial harm to the property owner.'' 304 N. Y. 105, 109, 106 N. E. 2d 34, 36 is within the province of the court of original jurisdiction, and it is difficult to disagree with Judge Froessel when he says: ''Material triable issues of fact thus remain, and a further hearing should adduce evidence relating to the nature of the surrounding neighborhood, the value and condition of the improvements on the premises, the nearest area to which petitioners might relocate, the cost of such relocation . . . .'' 4 N. Y. 2d 553, 563, 152 N. E. 2d 42, 47, 176 N.Y.S. 2d 598, 606.

While the dissent in the *Harbison* case seems grounded, as stated, upon a non-decisive holding in the *Miller* case, there is nevertheless merit in the contentions of Judge Van Voorhis. The dissent seems to carry weight when the particular ordinance involved is subjected to its scrutiny. Section 18 of the ordinance reads, in part: ''. . . The requirements of this subdivision [outlining that each use which is not a conforming use situated on premises in an ''R'' district shall cease or be changed to a conforming use within three years from the effective date of the amendment] . . .

shall apply in each of the following cases: "(b) any such non-conforming use involving the use of or accessory to one or more buildings or structures on the same lot, the aggregate value of which improvements for tax purposes is not more than five hundred dollars ($500.00) . . . ." 4 N. Y. 2d 553, 565, 152 N. E. 2d 42, 48, 176 N.Y.S. 2d 598, 607. This, says Judge Van Voorhis, is arbitrary, since, if the line can be drawn at $500.00, it will soon be extended to $5,000.00 or $50,000.00. The dissent reasons that implicit in this line of demarcation is the proposition that a municipality may take private property for a public use provided that it does not take too much.

After further discussion of the monetary aspect of the ordinance, the minority strikes hard in what is undoubtedly the crux of the dissenting opinion at the so-called "amortization period" provided by ordinances such as the one at issue. The courts, argues the minority, are bound without any rules to guide them to determine in each case whether or not a prior nonconforming use will be protected. It seems to be true, as Judge Van Voorhis contends, that the amortization periods in the adjudicated cases appear to bear no relation to the kinds of property or businesses involved. In the foreign cases relied upon by appellant City of Buffalo, the period varied widely, and the commonly accepted meaning of the word "amortization" seems to have been so distorted as to have become, within the framework of zoning ordinance cases, virtually meaningless. An "amortization plan" has been defined as one aiming toward the payment of an indebtedness, whereby partial payments of principal and interest are made, at stated periods for a definite time, at the expiration of which the entire indebtedness will be extinguished. *Bystra v. Federal Land Bank of Columbia,* 82 Fla. 472, 90 So. 478 (1921). In the light of this definition, it seems reasonable to agree that the term "amortization," as used in relation to zoning ordinances, is merely a "catch phrase."

The reasoning of the minority in this context, then, is reducible to the contention that it is illogical to assume that all junk yards, and all improvements assessed for tax purposes at not more than $500 will or have any tendency to depreciate to zero in three years. In a conservative and logical approach to the problem, Judge Van Voorhis concludes that the "amortization" theory, if extended far enough, would not only permit attacks upon any and all kinds of businesses, but would dissuade owners of nonconforming uses from improving them, and, rather, encourage them to permit depreciation. That this possibility has occurred to the various municipalities seems patent, and their reasoning perhaps might be that a relatively short period of nonimprovement, stagnation, and decay is tolerable since the way would then be open to clearance projects, free from the necessity of paying compensation. Equally obvious, however, is the conclusion that such "retroactive" zoning is not consonant with sound modern municipal practice, and it is arguable that, specific cases for the moment disregarded, herein lies the broad reason which partially motivated the dissent in the *Harbison* case.

The logic inherent in the dissenting opinion cannot be denied. It does seem that the majority, in its desire to further what it apparently regards as the least of all evils directed toward the elimination of nonconforming uses, has sanctioned an ordinance which sets forth a single period of amortization designed to include within its scope several categories of nonconforming uses. It remains, of course, to await the ultimate disposition of the *Harbison* case at special term, but at the same time it seems reasonable to conclude that, while the *Miller* case still stands, the decision under analysis opens the door in New York to permit the entrance of the reasonable amortization period as potentially the strongest weapon yet directed toward the elimination of the prior nonconforming use.

G. F. R., III

DAMAGES—MENTAL ANGUISH—RECOVERY FOR APPREHENSION OF FUTURE CONSEQUENCES

For the first time, the question of the allowance of recovery against an original wrongdoer for mental suffering arising from information the plaintiff received from a doctor to whom she had gone for treatment of the original injury, was presented to the New York Court of Appeals in the recently decided case of *Ferrara v. Galluchio,* 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

Plaintiff, suffering from bursitis in the right shoulder, received a series of x-ray treatments from defendants, doctors specializing in x-ray therapy. During the course of the treatments, plaintiff complained of nausea and some pills were prescribed. Subsequent to the seventh and last treatment, her shoulder became irritated, blistered, and raw, leaving a condition diagnosed as chronic radiodermatitis. Two years later, plaintiff was referred by her attorney to a dermatologist who prescribed a substance used in the treatment of radiodermatitis and advised her to have her shoulder checked every six months inasmuch as the area of the burn might become cancerous. At the trial, in addition to the introduction of evidence of defendants' malpractice, plaintiff introduced the testimony of a neuro-psychiatrist to the effect that she was suffering from severe cancerophobia, and that she might have permanent symptoms of anxiety. Of the jury's $25,000 verdict, $15,000 was awarded on the basis of mental anguish flowing from the cancerophobia. The supreme court's judgment, entered on the verdict, was unanimously affirmed by the appellate division. 3 App. Div. 2d 829, 161 N.Y.S. 2d 832 (1957). The court of appeals split 4 to 3 in affirming the judgment for plaintiff.

The rationale of the majority opinion lies in a wrongdoer's liability for the ultimate result of his wrong, notwithstanding the fact that the mistake or negligence of the physician who treated the injury may have increased the damage flowing from the original wrong. Finding that the examination and treatment by the dermatologist was occasioned by the original malpractice of defendants, the court reasoned thus: since defendants would have been liable for the physical injuries aggravated by the substance prescribed by the dermatologist for the burn and for the accompanying mental anguish, so also defendants ought to be liable for the mental anguish resulting from the admonition that plaintiff should watch for cancer.

The court's position on defendants' responsibility for the ultimate result of their malpractice is supported by the cases, *Milks v. McIver,* 264 N.Y. 267, 190 N.E. 487 (1934); *Wagner v. Mittendorf,* 232 N.Y. 481, 134 N.E. 539 (1922); *Sauter v. N.Y.C. & H.R.R. Co.,* 66 N.Y. 50 (1876); *Lyons v. Erie Ry. Co.,* 57 N.Y. 489 (1874). On that point, *Milks v. McIver, supra,* bears directly. There, plaintiff, having been injured in an automobile accident, was taken to a hospital and received treatment which was negligently administered. Judge Lehman, in holding that a release of all claims by plaintiff against the original wrongdoer barred recovery against defendant, an attending physician whose treatment aggravated the original physical injury, said, "The rule is now well established that a wrongdoer is liable for the ultimate result, though the mistake or even negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong." *Id.,* p. 270, 190 N.E. at 488.

But here the problem encompasses more than a wrongdoer's liability for aggravated physical injuries; it involves the liability of an original wrongdoer for purely mental suffering introduced by another force and based upon a mere conjecture and remote possibility. Though the court observed this difference, it failed to find a sound reason for distinguishing between the two situations. Chief Judge

Conway, speaking for the majority, said: "The original wrong certainly occasioned the examination and treatment by the dermatologist. He prescribed a substance to be used by plaintiff for the burn. Had such substance aggravated plaintiff's injury no one could doubt that, under the present state of our law, the original wrongdoers would be responsible for the resulting damage to its full extent *including additional mental anguish caused plaintiff*. The only difference here is that the later treatment by the dermatologist did not aggravate the physical injury inflicted by the original wrongdoers but, rather, increased only the mental anguish attendant upon such injury. We perceive no sound reason for drawing a distinction between the two situations." *Ferrara v. Galluchio, supra* at pp. 20, 21, 152 N.E. 2d at 252, 176 N.Y.S. 2d at 999.

The minority, however, did find a basis for a distinction. Also citing *Milks v. McIver, supra,* they determined that the limits of liability dictated by public policy or common sense precluded recovery of damages for mental anguish caused by a physician's statement of possible developments of the original injuries.

This being a case of first impression in the court of appeals, neither the majority opinion nor the dissent of the court, nor the briefs of the respective counsel, supply a case from the court of appeals which is directly in point. Among the numerous cases cited in appellants' brief, only those bearing on the question of the admission of evidence of mental anguish as a concommitant of physical injury and pain can be designated as even of remote relevance, and those are obviously distinguishable from this case of the apprehension of future consequences and therefore of little value.

With such a dearth of cases in New York, the aid of foreign jurisdictions would seem welcome in formulating a rule. But, similarly, there is a paucity of cases there. And those courts which have had the question of allowance for apprehension of future consequences of an injury have left it in an inconclusive state, with some cases allowing recovery, *Smith v. Boston & M.R.R.*, 87 N.H. 246, 177 A. 729 (1935); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928); *Texas & P. Ry. Co. v. Crockett*, 298 S.W. 654 (Tex. Civ. App. 1927); *Elliot v. Arrowsmith*, 149 Wash. 631, 272 P. 32 (1928); and with some denying recovery, *St. Louis, I.M. & S. Ry. Co. v. Buckner*, 89 Ark. 58, 115 S.W. 923 (1909); *Illinois Central R.R. Co. v. Cole*, 165 Ill. 334, 46 N.E. 275 (1896); *Lake Erie & W.R. Co. v. Johnson*, 191 Ind. 479, 133 N.E. 732 (1922); *Boatright v. Portland Ry., Light & Power Co.*, 68 Or. 26, 135 P. 771 (1913).

The conflict represented by this split in the decisions of foreign jurisdictions is inherent in the very nature of the problem, and, therefore, its existence is not difficult to understand. On the one hand is the logical extension of a well settled rule; on the other is the difficulty of practical considerations arising from that rule's extension.

As has been noted above, the court professed to feel that there was no basis for a distinction between holding the original wrongdoer liable for the aggravation of the physical injury and accompanying mental anguish in the present case. Logically, there may not be. That the court, in fact, did recognize a practical distinction, however, is evidenced by its attempt to answer the foremost objection to such an extension, namely, the impossibility of ascertaining credibility or extent, when it said, quoting PROSSER ON TORTS, § 34 (1941), that freedom from the danger of vexatious suits can be obtained by requiring definite medical proof based on definite physical symptoms to corroborate the claim.

But, merely saying that definite physical proof should be required does not obviate the fact that such proof is nonexistent both in the present case and generally. What, then, is the standard which this proof is to meet? The court does not say what plaintiff's corroborating physical symptoms were, or that the presence or absence of such symptoms was determinative.

The implications which arise, therefore, are disturbing. Courts would, under the furthest extension, be confronted with cases running the gamut from emotional plaintiffs suffering from hypersensitiveness caused by doctors' routine admonitions and the mass of popular literature, to opportunists feigning distress and mental anguish over *possible* developments of their injuries. The dissent, written by Judge Froessel, expressed fear of just this situation in saying: "The unfortunate result of the rule announced by this decision, albeit disclaimed, is that a doctor's mere statement as to a possibility is a steppingstone to an increased recovery should the patient simply claim to be concerned enough to suffer worry by reason thereof." *Ferrara v. Galluchio, supra,* at 23, 152 N.E. 2d at 253, 254, 176 N.Y.S. 2d at 1001. The difficulties raised by the allowance of recovery are manifest; their solution remains inadequate.

But neither is this a sweeping declaration of a new position by the court. It is merely an entry into a hitherto unexplored field, and this must be borne in mind in assessing the decision's possible effects. The court expressed its disposition to limit the effect of this case, and it is possible that in the future development and application of the rule, more restricted and definitive limits will be set.

J.C.R.

LABOR LAW—PICKETING—INJUNCTIONS—JURISDICTION OF STATE COURT

In the case of *Pleasant Valley Packing Co. v. Talarico,* 5 N.Y.2d 40, 152 N.E.2d 505, 177 N.Y.S.2d 473 (1958), the court of appeals, reversing the appellate division, granted a motion for a temporary injunction enjoining picketing and related activity by a district union against an employer whose employees were represented by a duly certified independent union.

The petitioner was a meatpacking company located in Schenectady, N. Y. The respondent, an officer of a district union, had for some time tried, unsuccessfully, to influence the petitioner's employees to join the respondent union. Thereupon, the respondent union commenced picketing of the petitioner's premises to compel the petitioner to recognize it rather than the independent union which had been certified by the NLRB as the collective bargaining agent of the petitioner's employees.

The motion for a temporary injunction was opposed on two grounds: (1) NEW YORK CIVIL PRACTICE ACT § 876-a bars injunctive relief where a labor dispute exists or where no irreparable injury is likely to result, or (2) Congress has pre-empted for regulation under the LABOR MANAGEMENT RELATIONS ACT (TAFT-HARTLEY ACT) § 8(b), 61 Stat. 141 (1947), 29 U.S.C. §158 (b) (1952), a field of unfair labor practices which includes the present activity.

Special term found that the picketing was ''recognitional'' rather than ''organizational'' and that irreparable damage was likely to result. In addition, it was not found that a genuine labor dispute existed. Affirmed findings of fact are conclusive in the court of appeals. For purposes of the petitioner's motion, therefore, the facts in this action do not lie within §876-a of the CIVIL PRACTICE ACT, and an injunction is not barred. *Goodwins, Inc. v. Hagedorn,* 303 N.Y. 300, 101 N.E.2d 697 (1951).

The district union's activities violate the NATIONAL LABOR MANAGEMENT RELATIONS ACT only if they are within the scope of activities defined by the act as unfair labor practices. The appellate division, reversing the special term, on the law, held that the union's activities were within the purview of the federal act, citing *Garner v. Teamsters' Union,* 346 U.S. 485 (1953). Here, the respondent union, representing only a small portion of the petitioner's employees, sought by picketing to coerce the petitioner into influencing his employees to join the union. This was held to be within the jurisdiction of the NLRB, and state action was invalid. In the principal case, however, the picketing was to compel the employer to recognize the picketing union, in abrogation of petitioner's duty to bargain with the duly certified union. Therefore, the court of appeals found that the *Garner* case was not controlling in the factual situation presented by the principal case. In reversing the appellate division, and granting the motion for a temporary injunction, the court of appeals cautioned against the tendency to proclaim a lack of state jurisdiction in this general area. Irreparable harm may be done to a petitioner who is denied recourse to the state courts because of an erroneous ruling that the state has no jurisdiction in the matter. The court then laid down the basic policy that any doubt should be resolved in favor of jurisdiction, leaving to the United States Supreme Court the final determination of the correctness of the state action.

The court of appeals, in a somewhat similar case, *Goodwins, Inc. v. Hagedorn, supra,* decided before the *Garner* case, enjoined picketing of an employer's premises to coerce the employer into recognizing the picketing union despite the fact that conflicting claims of the respondent union and a rival union for certification were pending before the NLRB. It was held that the picketing had the tortious objective of coercing the employers to commit an unlawful act—that of interfering with the right of their employees to choose their own collective bargaining agent (NEW YORK CONSTITUTION, article I, §17). The court pointed out that the federal statute was silent about picketing by a labor union for an unlawful purpose such as was there presented.

The pertinent section of the NATIONAL LABOR MANAGEMENT RELATIONS ACT, 1947, is paragraph (4) of subdivision (b) of section 8, "It shall be an unfair labor practice for a labor organization or its agents— . . . (4) to engage in . . . a strike . . . where an object thereof is: . . . (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of § 159 of this title; . . . ." (29 U. S. C. § 158.)

Since, in the *Goodwins* case, there was no strike and no certified collective bargaining representative, there was no applicable federal provision and no conflict between state law and federal law. Likewise, in the principal case, there was no strike; and the federal provision does not apply.

Several United States Supreme Court decisions, based on the *Garner* case, have been cited as indicating that state courts are without jurisdiction to enjoin picketing by a union to put economic pressure on an employer. In *Weber v. Anheuser-Busch,* 348 U.S. 468 (1954), the Court recognized the existence of a no-man's-land in which the NLRB has declined to exercise jurisdiction but where the federal statute has pre-empted the jurisdiction of the state court.

In *Guss v. Utah Labor Board,* 353 U.S. 1 (1956), the union charged an employer with unfair labor practices under §8

(a) (1), (3), (5) of the NATIONAL LABOR MANAGEMENT RELATIONS ACT [61 Stat. 140, 141 (1947), 29 U.S.C. §158 (a) (1), (3), (5) (1952)]. The Supreme Court held that the power vested in the NLRB has completely displaced state power even though the board has declined to exercise its jurisdiction. The Court said, ''We are told by appellee that to deny the State jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. We are told by appellant that to grant jurisdiction would produce confusion and conflicts with federal policy. Unfortunately, both may be right. We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land.'' 353 U. S. 1 at 10.

In *Meatcutters v. Fairlawn Meats,* 353 U.S. 20 (1956), a union not representing the employees of a certain employer commenced picketing and secondary pressures to compel the employer to sign a contract calling for a union shop contract. The Supreme Court held that the union activity was a violation of the Taft-Hartley Act, §8 (b) (2), *supra.* The state court was barred from taking jurisdiction although it was assumed the NLRB would have declined jurisdiction since the volume of interstate business was less than the board's current standards for asserting jurisdiction.

Likewise, in *San Diego Unions v. Garmon,* 353 U.S. 26 (1956), the Supreme Court said the state court had no jurisdiction to enjoin picketing or other secondary pressures by a union not chosen as the workers' collective bargaining agent to force the employer to sign a labor contract which included a union shop provision, citing the *Guss* case and the *Fairlawn* case.

Each of this series of cases, beginning with the *Garner* case, may be distinguished from the principal case on the facts. In summary, then, they merely hold that state action is invalid *if* the labor activity in question is within the scope of the Taft-Hartley Act. The question remains whether the present activity falls within the definition of unfair labor practices under the Taft-Hartley Act.

That the decision in the *Garner* case did not overrule the controlling effect of the *Goodwins* case was implied by the New York Court of Appeals in the case of *Wood v. O'Grady,* 307 N.Y. 532, 122 N.E.2d 386 (1954). Here it was found that the objective of the picketing was organizational which is a lawful objective of a labor dispute under NEW YORK CIVIL PRACTICE ACT, §876-a. The court said that the *Goodwins* case—not dealing with peaceful picketing for purposes of organization, but to compel recognition of the union by the employer—was not applicable to the existing facts.

The Supreme Court in the *Garner* case acknowledged that the NATIONAL LABOR MANAGEMENT RELATIONS ACT leaves a legitimate area of state action, although pointing out that Congress refrained from saying how much. Again in the *Fairlawn* case, the Supreme Court said that it might be possible for the state to frame and enforce an injunction aimed narrowly at a trespass. The Ohio court, believing it could pass upon the union's conduct in its entirety, issued a unitary judgment which the United States Supreme Court set aside, but stated, "Whether its conclusion as to the mere act of trespass would have been the same outside of the context of petitioner's other conduct we cannot know." 353 U.S. 20 at 24.

The United States Supreme Court has vigorously upheld state action to enjoin labor activity when a state statute is violated and the activity is not within federal jurisdiction. *Building Service Union v. Gazzam,* 339 U.S. 532 (1950); *Plumbers Union v. Graham,* 345 U.S. 192 (1953). In the case of *Automobile Workers v. Wisconsin Board,* 336 U.S. 245 (1948), the Wisconsin Employment Relations Board, under statute, ordered union workers to desist from engaging in a concerted effort to disrupt production through attendance at union meetings at irregular times throughout the day with no notice to the employer as to the time or duration of such meetings. The Supreme Court held that the state statute did not impose any involuntary servitude in violation of the 13th amendment, and did not invade free speech and assemblage under the 14th amendment. It was clearly indicated that the national act was not intended to exclude state power sought to be exercised in this case. The Court said, ''There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards, because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question.'' 336 U.S. 245 at 254. Also, ''However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that 'Congress designedly left open an area for state control' and that the 'intention of Congress to exclude States from exercising their police power must be clearly manifested.' *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U.S. 740, 750, 749.'' 336 U.S. 245 at 253.

The New York Court of Appeals in the principal case concedes that the United States Supreme Court conceivably could rule that the difference between the principal case and the *Garner* case is unsubstantial. Nevertheless, the distinction seems clear. The actions enjoined in the principal case did not necessarily entail coercion by the petitioner upon his employees, but did entail an abrogation of petitioner's legal duty to contract only with the duly certified independent union, with which it has a contract required by law. It appears that the court in the principal case is attempting to close up the no-man's-land in which the state court has no jurisdiction to act although the NLRB has declined to assume jurisdiction. To lessen the possibility of irreparable harm to a petitioner who is unable to obtain a hearing, the state courts will, apparently, in the light of the principal case, assume jurisdiction in all cases not specifically enumerated in the NATIONAL LABOR MANAGEMENT RELATIONS ACT.

A.H.F.

PENAL LAW — MISLEADING ADVERTISING — IMMATERIALITY OF SUBJECTIVE INTERPRETATIONS

The majority opinion of the court of appeals in the 4–3 decision of the case of *People v. Minjac Corporation,* 4 N.Y. 2d 320, 151 N.E. 2d 180, 175 N.Y.S. 2d 16 (1958), held that a vendor may not establish prices on merchandise at levels considerably higher than the prices customarily charged by other vendors, mark those prices down and by means of deceptive advertising create the impression that such merchandise could be purchased for less than the price generally charged by his competitors, without being in violation of § 421 of the Penal Law.

Defendant Corporation was engaged in the sale of toys and other merchandise and claimed that it offered for sale a thousand different items. Among the advertising signs displayed in the window of defendant's store there appeared the following:

WESTCHESTER FIRST
TOY DISCOUNT
SUPER MARKET
20% to 40% Off

LARGEST SELECTION OF
STANDARD
TOYS
BRAND
20% to 40% Off

TOYS
20% to 40% Off
Come in and Browse Around

People v. Minjac Corporation, supra, at 322, 151 N.E. 2d at 182, 175 N.Y.S. 2d at 18.

A competitor of defendant entered the store and purchased three standard brand games, two of which were sold at a price in excess of the prevailing price of such games in the community and the third sold at the customary price. The arrest and conviction of the defendant, under § 421 of the PENAL LAW, entitled "Untrue and misleading advertising," followed. From the decision of the Westchester County court affirming the judgment, defendant appealed.

Burke, J., in the majority opinion held that the determination of the lower courts in holding that the advertising in question ". . . left the impression that the price being charged [by defendant] was 20% to 40% less than the prevailing price", could not be disturbed as completely unsupportable. 4 N.Y. 2d at 323, 151 N.E. 2d at 182, 175 N.Y.S. 2d at 19 (1958).

"The applicable portion of § 421 of the PENAL LAW provides that any corporation with the intent to sell or in any way dispose of merchandise directly or indirectly to the public 'makes, publishes, . . . places before the public . . . in the form of a . . . poster, bill, sign, placard . . . an advertisement . . . which contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor'." 4 N.Y. 2d at 322, 151 N.E. 2d at 182, 175 N.Y.S. 2d at 17 (1958).

This section has been held to be constitutional as a proper exercise of the police power of the state. The authority most cited is that of *People v. Rosenberg,* 138 N.Y. 410, 34 N.E. 285 (1893), wherein the court announced that "The legislature, under the police power, may certainly regulate or even prohibit the carrying on of any business in such manner and in such place as to become dangerous or detrimental to the health, morals or good order of the community." 138 N.Y. at 415, 34 N.E. at 286. The dissenting opinion of Judge Van Voorhis, concedes that this statute is a legitimate exercise of such power. "The statutory offense is committed by 'material misrepresentations intended to influence the bargain' though at times such misrepresentations may be due to the lack of care rather than to dishonesty.'' *People v. Richter's Jewelers, Inc.,* 291 N.Y. 161, 166, 51 N.E. 2d 690, 691 (1943).

Historically it would appear, that the intent of the legislation was to ''prevent fraud, affecting both the public and the owner of trade marks, by prohibiting the sale of goods from an original package labeled with a trade mark. . . .'' *People v. Luhrs,* 195 N.Y. 377, 381, 89 N.E. 171, 172 (1909). So in this case it was held that a defendant bartender was properly convicted under § 364 of the PENAL CODE, where he refilled a Wilson whiskey bottle from an unlabeled demijohn. In the appellate division, the court recognized that the intent of the defendant was immaterial, the act alone constituted a violation. *People v. Luhrs,* 127 App. Div. 634, 111 N.Y.S. 749 (1908).

It is interesting to speculate as to whether the prime motive for the enactment of the statute in these early days of industrial growth was for the protection of the property rights of the brand names and registered trade marks of the corporations to a greater degree, rather than the protection of the buying public. Some degree of color is lent to this theory by the fact that when the section was repealed and re-enacted as § 421 of the PENAL LAW by the Laws of 1915, ch. 569, the word ''knowingly'' appears. This had the effect of weakening the statute in that proof of knowledge on the part of the defendant became essential to successful prosecution.

It is probable that false advertising claims by merchants so defrauded the public as to prompt the legislature to strike out the word ''knowingly'' from the section by the Laws of 1921, ch. 520. The effect was to give greater strength to the statute. The appellate division construed this as rendering criminal ''any untrue representations of fact published or circulated . . . without regard to the honest belief of the person making such a representation that it is true.'' *People v. Clark,* 252 App. Div. 122, 124, 297 N.Y.S. 776, 778 (1937).

In the principle case the court of appeals seems to have gone a long way to sustain the conviction but in doing so, they clearly underlined the principle that the advertiser's subjective approach is irrelevant. The test then appears to be whether the advertising is such as to deceive the public. This position is consistent with the position taken by the court in *People v. Federated Radio Corp.,* 244 N.Y. 33, 154 N.E. 655 (1926), which held that allegations of actual or intentional legal fraud were unnecessary in testing the sufficiency of the information. Even where it can be established that an innocent mistake has been made ''without actual evil design or contrivance to perpetrate fraud or injury upon others,'' which nevertheless is deceptive, untrue or misleading, it is a violation of the statute. *People v. Richter's Jewelers, Inc.,* 291 N.Y. 161, 165–166, 51 N.E. 2d 690 at 691.

Inherent in this decision is the difficulty that the unscrupulous advertiser, however venal his intent, can escape liability under the section by actual, although not verbal deception. Thus, in the case of *People v. Le Winters Radio Stores, Inc.,* 256 App. Div. 1098, 11 N.Y.S. 2d 689 (1939), the appellate division reversed the conviction where the word ''from'' in small letters, preceded a price quotation in large figures which was attached to a refrigerator of a larger size than was available at the quoted price. The court stated that ''the sign did not indicate that the particular refrigerator upon which it was placed could be purchased for the figure stated on the sign,'' 256 App. Div. at 1098, 11 N.Y.S. 2d at 690, although recognizing that the effect of the sign was to lure customers into the store. So, too, where the defendant operated a cleaning shop which displayed a sign three feet long and two feet wide stating in two inch lettering ''Suits—Dresses,'' and in eight to ten inch lettering ''29¢'' and thereafter listing in one inch lettering multiple exceptions which effectively nullified the impression created by the large lettering, defendant was discharged. The complaint alleged that the defendant charged a customer 39¢ for a two-piece suit which defendant proved was among the exceptions listed in small lettering on his sign. *People v. Spotless Stores,* 248 N.Y. 734, 31 N.E. 2d 203 (1940).

In the instant case the difficulties which the majority opinion invite and the weakness of the decision are illustrated by Judge Van Voorhis, in his dissent. Therein he states, "Moreover, the discount sign did not indicate that every item, even of toys, would be sold at a reduced price. There were 1,000 different types of articles on display, and, as in the case of many bargain sales, not all of them were priced at a discount. The signs meant that 20% to 40% price reductions could be obtained on a substantial number of standard brand toys. There is no evidence that this was not the case in appellant's store. The evidence, as we view it, does not support the statements made in the majority opinion on this phase of the case. This advertisement proclaimed that toys were being sold at 20% to 40% off. Proof is insufficient merely to the effect that some toys were not sold at these discounts. . . . There was no advertising or representation that every toy would be sold at 20% to 40% off. . . . The whole subject of discounts and markdowns is involved in so much confusion, and these practices are so common, even in the best regulated stores, that it is difficult to unravel with the precision which is necessary to a criminal prosecution." 4 N.Y. 2d at 325, 151 N.E. 2d at 183, 175 N.Y.S. 2d 20. This view appears to be more consonant with the reaction of the public to present day dramatic and exaggerated advertising practices which have inculcated a certain wariness. The decisions however leave the unwary prospective purchaser the easy victim of the crafty advertiser who, with malice, lures his victims to his store with the "fine print" escape method.

In the case under discussion, the decision seems unaffected by the fact that the advertiser did not state that all toys were reduced 20% to 40%. This would seem to raise the question as to whether the court would follow its decision in *People* v. *Spotless Stores, supra,* if the facts were again presented.

The rigidity of this decision would seem to place a heavy burden upon the honest merchant who may be driven, thereby, to the practices of the fine print type advertiser, which in turn, would have the effect of diluting the statute. Upon this state of the decisions, it would seem clear that attention should be given to devising a legislative formula for the solution of the problems.

J.E.C.

SERVICE OF PROCESS—IMMUNITY FROM

On April 13, 1956 defendant, who was a citizen and resident of North Carolina, was (with several others including plaintiff's corporation) indicted in the United States District Court for the Southern District of New York for allegedly manipulating the accounts of plaintiff Thermoid Company in order to defraud the federal government of taxes. Thermoid is a Delaware corporation of which defendant Fabel had been, until 1955, president, a director, and a large stockholder. No warrant or summons in that criminal cause was ever served on Fabel who was in North Carolina when indicted. Such a warrant or summons could, under subdivision (b) of rule 40 of the FEDERAL RULES OF CRIMINAL PROCEDURE, have been executed anywhere in the United States and defendant could have been removed from North Carolina to New York. However, no such proceedings became necessary since four days after indictment Fabel surrendered to the district court in New York City, pleaded guilty, posted $3,000 bail, was released and returned to his home in North Carolina. He returned to New York in January, 1957 for the trial of the indictment. On February 27, 1957, after several weeks of trial, he withdrew his former plea of guilty to one count of the indictment and *nolo contendere* to the others. Bail was continued and Fabel went back to North Carolina, returning to New York on March 17th and remaining there until March 26th, on which date he was sentenced to pay a $25,000 fine and given a jail sentence which was suspended. As he left the federal courthouse in New York City after being sentenced, he was served with the summons and complaint in this civil action brought against him by his corporation. The complaint seeks damages against Fabel because of alleged acts which are the same, substantially, as those charged in the indictment. Fabel, appearing specially, then moved to set aside the service on the ground that he was immune from such service.

Special term granted the motion and set aside the service holding that defendant was entitled to immunity because he had voluntarily come into the state, departed and returned here. The appellate division, however, was of the opinion that New York State's public policy in such cases had been established by section 855 of the NEW YORK CODE OF CRIMINAL PROCEDURE. This statute, adopted in 1936, gives immunity until conviction only to a defendant who has been brought into this state on extradition or after waiver of extradition. While Fabel was not extradited and did not waive extradition, the appellate division thought that the situation was so similar to waiver of extradition that it should be treated in the same way.

The rule has long been established in New York that any non-resident who comes into this state to act as a witness, or in any other way aids in the administration of justice in a civil action, is immune from service of civil process while so attending here and for a reasonable time thereafter so that he may return home. A long line of cases has established this rule. The court held so in *Person v. Grier,* 66 N.Y. 124 (1876) where defendant came into this state to act as a witness in another proceeding. In *Matthews v. Tufts,* 87 N.Y. 568 (1882) a non-resident creditor attending a meeting of creditors of a bankrupt was held to be immune from service of civil process while he was in New York. *Parker v. Marco,* 136 N.Y. 585, 32 N.E. 989 (1893), an often cited case, applied the same rule where the defendant came here voluntarily for an examination of plaintiff and his witnesses in furtherance of an action against him in the federal courts. The rule was applied in *Chase National Bank v. Turner,* 269 N.Y. 397, 199 N.E. 636 (1936) to a person who came into the state to hear the argument of her appeal. *Powell v. Pangborn,* 161 App. Div. 453, 145 N.Y. Supp. 1073 (1914) extended the rule to those appearing before referees in bankruptcy holding that public policy and comity towards the federal courts demanded that immunity be accorded in such cases. *Kreiger v. Kreiger,* 7 Misc.2d 595, 71 N.Y.S. 2d 448 (Sup. Ct. 1947) held that where a defendant came here voluntarily without waiting for arrest to plead to an indictment against him in a federal court he was immune from service of civil process. Immunity from service of civil process was accorded to a witness who came voluntarily from Germany to appear in a federal court and was then subpoenaed in order to bind him to appear, *Bunce v. Humphrey,* 214 N.Y. 21, 108 N.E. 95 (1915). The court in that case held that defendant came within the spirit of the rule. In *New England Industries v. Margiotti,* 270 App. Div. 488, 60 N.Y. S.2d 430 (1946) a party who came here as an adverse party pursuant to an order procured for his examination before trial, which was not served on him personally, was held to be immune. The defendant's appearance was deemed to be voluntary and within the spirit of the rule in *Merritt v. Genth,* 130 Misc. 401, 223 N.Y.S. 593 (Sup. Ct. 1927) where he appeared before our courts in answer to a summons alleged to have been, but not, served on him. *Murphy v. Sweezy,* — Misc. —, 2 N.Y.Supp. 241 (Sup. Ct. 1888) held the same rule applied to a non-resident who came into the state to answer a criminal charge and was forced to wait under a bail bond until the complaining witness could attend the hearing.

The rule according immunity from service of process does not apply to persons who are brought within the state under compulsion of process. The court denied the motion to dismiss in *Netagraph Mfg. Co. v. Scrugham,* 197 N.Y. 377, 90 N.E. 962 (1910) where the defendant voluntarily attended a legislative hearing in Albany, was arrested on a warrant, posted bail, left the state, returned, and was served with a summons after he was acquitted. It was felt that the general rule did not apply because the defendant was first arrested and having posted bail had no choice but to return. The distinguishing feature of *Dwelle v. Allen,* 151 App. Div. 717, 136 N.Y.Supp. 216 (1912) was that after defendant had voluntarily come into the state in answer to a smuggling charge in a federal court and was acquitted, he was then subpoenaed by the United States to appear later as a witness and was therefore under compulsion. *Woodward v. Continental Charters, Inc.,* 203 Misc. 581, 116 N.Y.S. 2d 633 (Sup. Ct. 1952) held that defendant was here under compulsion when he appeared because of a subpoena issued by the Civil Aeronautics Board. In *Sander v. Harris,* 59 Hun 628, 14 N.Y.Supp. 37 (1891) the defendant was denied immunity only because he failed to allege in his affidavit that he appeared voluntarily in this state in order to answer the criminal charge of disorderly conduct. *Slade v. Joseph,* 5 Daly 187 (1874), *Williams v. Bacon,* 10 Wend. 636 (1834), *Lucas v. Albee,* 1 Denio 666 (1845), *Browning v. Abrams,* 51 How. Prac. 172 (1876) and *Martin v. Woodhall,* 24 Jones & Spencer 439 (1889) were all cases in which immunity was denied because the defendants were brought into the state and convicted on legal, valid criminal charges before being convicted and then served with civil process. The court, in answer to the argument of counsel, agreed that defendants would have enjoyed immunity from civil process if it could have been proved that they were brought into the state on criminal charges solely as a trick so that process could be served upon them in civil actions. The policy indicated by the dicta in those cases is evidenced by section 855 of the NEW YORK CODE OF CRIMINAL PROCEDURE. That section states that a defendant is immune from service of civil process after he has been extradited or is brought here having waived extradition until he has been convicted, or, having been acquitted, until he has been given an opportunity to leave the state. The *Fabel* case is not governed by that section because the defendant was not extradited and did not waive extradition. Section 855, which is merely a codification of the rule announced by way of dictum in *Slade v. Joseph, supra,* should be read with section 851 of the CODE OF CRIMINAL PROCEDURE.

Section 855 of the CODE OF CRIMINAL PROCEDURE accords protection only to those defendants who are brought into the state under the guise of criminal proceedings; but in reality, for the collection of civil demands. The immunity does not exist after the defendant is convicted. Perhaps there is no reason for continuing the immunity after conviction because the process has not been abused, but is this to say that immunity from civil process is to be denied to one who voluntarily comes into the state to answer a criminal charge? The policy of the law is to encourage individuals to voluntarily come into the state to aid in the administration of justice. Would these individuals be willing to come voluntarily if they knew their immunity from service of civil process would be non-existent upon conviction?

R.J.P.

TORT—FRAUD AND DECEIT APPLIED TO MATTERS OF OPINION

"One who fraudulently makes a misrepresentation of fact, opinion, intention or law, for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable to the other for the harm caused by him by his justifiable reliance on the misrepresentation." Restatement (Third), Torts § 525 (1934).

In a recent decision, it was decided that a person's intent, his state of mind, is capable of being ascertained and a statement of present intention is deemed a statement of a material existing fact, sufficient to support a fraud action. *Channel Master Corp. v. Aluminum Ltd. Sales,* 4 N.Y. 2d 403, 151 N.E. 2d 833, 176 N.Y.S. 2d 259 (1958).

The plaintiff is a manufacturer and processor of aluminum. His business requires a dependable supply of aluminum ingot. The defendant a seller of this ingot represented to the plaintiff, "that its available and uncommitted supplies and productive capacity of aluminum ingot, then existing, were such as rendered it then capable of selling to the plaintiff 400,000 pounds per month and that it had entered into no binding commitments with other customers which could in the future reduce such available and uncommitted supplies and productive capacity." *Channel Master Corp. v. Aluminum Ltd. Sales,* 4 N.Y. 2d 403, 405, 151 N.E. 2d 833, 835, 176 N.Y.S. 2d 259, 261 (1958).

In truth the defendant had committed his supplies by contract to other customers and the plaintiff in reliance on these statements refrained from future commitments.

The defendant moved to dismiss the complaint urging the insufficiency of the cause of action, under rule 106 of the Rules of Civil Practice. The court at special term granted the defendant's motion. On appeal the appellate division unanimously reversed and denied the motion. *Channel Master Corp. v. Aluminum Ltd. Sales,* 5 App. Div. 2d 715, 169 N.Y.S. 2d 179 (1957). On appeal to the court of appeals the ruling of the appellate division was affirmed.

The case centered upon the issue of whether or not the defendant's statements were expressions of future expectations or statements of existing fact. The court concluded that since the representations were within the personal knowledge of the defendant they were statements of fact, for representations show intent and intent is ascertainable. *Sabo v. Delman* 3 N.Y. 2d 155, 143 N.E. 2d 906, 164 N.Y.S. 2d 714 (1957); *Ritzwoller v. Lurie* 225 N.Y. 464, 122 N.E. 634 (1919); *Rampell v. Hyster* 3 N.Y. 2d 369, 144 N.E. 2d 371, 165 N.Y.S. 2d 475 (1957).

Burke, J. in his dissenting opinion said, "it is clearly evident that the alleged representations relate to an unknown, uncertain and indefinite future period, not to an existing fact. These allegations do not treat at a particular time with the state of mind of a person in possession of all information whose expressed intentions as to the future can readily be effectuated, but with unpredictable problems of the logistics of supply and demand of not only finished products but also raw materials in a huge industry beset by many varieties of weather, of labor relations, of customers' demands and of government needs. The alleged representations under such circumstances could neither be an affirmation of events which, when made, defendant knew would not occur nor assertions of present facts susceptible of knowledge. Any reliance on the alleged representations, therefore, was unjustifiable as plaintiff knew perfectly well that the representations of necessity were speculative." *Channel Master Corp. v. Aluminum Ltd. Sales* 4 N.Y. 2d 403, 409, 151 N.E. 2d 833, 836–37, 176 N.Y.S. 2d 259, 261 (1958).

Burke's opinion cites the problems involved in determining whether certain statements can be susceptible of present ascertainment, and the points cited in his argument are backed by a body of cases. However, the majority appears to be on solid ground in this case because of the fact that the defendant had contracted away his supplies to others.

The type of interest protected by the law of deceit is the interest in formulating business judgments without being misled by others—in short of not being cheated. The New York courts are reticent in allowing fraudulent statements in business transactions to be passed off as opinion relating to the future. For facts include not only the existence of tangible things but also the state of mind, such as the entertaining of an intention or the holding of an opinion.

In *Rothchild v. Mack* 115 N.Y. 1, 7, 21 N.E. 726, 727–28 (1889) J. Peckam said, ''he either knew or he did not know of the financial condition of the makers of the note. If he did know it, then he knew that the note, was without value. If he did not know its condition, he yet assumed to have actual knowledge of the truth of his statement that the note was as good as the Bank of England.'' This is fraud.

In *Sabo v. Delman* 3 N.Y. 2d 155, 143 N.E. 2d 906, 164 N.Y.S. 2d 714 (1957) the plaintiff, Sabo, had invented a machine on which he took out a patent. The defendant represented to the plaintiff that if he would execute an assignment of the patent to him, he would finance the manufacture of the machine and would use his best efforts to promote the sale or lease of the machine to other manufacturers.

The court in sustaining the fraud held that although the defendant's representations were futuro, they were statements of an arrangement to be done, and the party making them knew they would not be done. ''If a promise was actually made with a preconceived and undisclosed intention of not performing it, it constitutes a misrepresentation of a 'material existing fact.' '' *Sabo v. Delman* 3 N.Y. 2d 155, 160, 143 N.E. 2d 906, 908, 164 N.Y.S. 2d 714, 716 (1957).

Reckless statements without regard to their truth, where the other elements of fraud are present, are also actionable. "Fraud includes the pretense of knowledge when knowledge there is none." *Abel v. Paterno* 245 App. Div. 285, 288, 281 N.Y.S. 58, 63 (1935).

Every fraud, however, is not actionable. *Bracket v. Griswold* 112 N.Y. 454, 20 N.E. 376 (1889) held that where reliance was not shown upon the misrepresentation, a cause of action was not made out, despite the fact that the defendant committed a fraud on the public and the plaintiff was injured.

Deceit and injury must concur. It must be relied on as the action to inducement. *Ochs v. Woods* 221 N.Y. 335, 117 N.E. 305 (1917). It is therefore of no consequence whether an opinion is a fact or a prophecy if the other elements of the tort are absent.

In *Hadock v. Osmer* 153 N.Y. 604, 47 N.E. 923 (1889) the plaintiff relied on the defendant's representation that a certain person was good for whatever money lent to him. The court held this was more than opinion, it was a representation of an existing fact. "A man has no right to state a thing as a fact, which misleads the other party to his damage, unless he knows whether it is true or untrue." *Hadock v. Osmer* 153 N.Y. 604, 608, 47 N.E. 923 (1889).

This doctrine has, however, its limitation. For not all statements even though they are untrue can be the basis of a tort. Honest belief of statements, although untrue, and not recklessly made are not actionable. *Kountze v. Kennedy* 147 N.Y. 124, 41 N.E. 414 (1895).

A misrepresentation inducing non-action where action would have been taken is fraud if there is injury. *Stern Bros. v. N.Y. Edison* 251 App. Div. 379, 296 N.Y.S. 857 (1937). In this case the defendant represented to the plaintiff, a consumer of his electric power, that a change in his service classification would result in a savings of only $1500. In reliance upon this the defendant did not change. The savings actually would have been $6000. The court held that the "representation concerned conditions of usage 'then existing' in the premises and the use of current 'then being made' which were adopted 'as the basis' for calculating relative costs. Such expression is not a matter of prophecy or opinion. It is a fact within the knowledge of the defendant." *Stern Bros. v. N.Y. Edison,* 251 App. Div. 379, 381, 296 N.Y.S. 858 (1937).

Not all opinions amount to facts as pointed out by Judge Burke in the principal case. Cases holding that representations are matters of opinion or relating to the future cannot be classified as cases being opposed to the principal case for they rest on different principles, and are measured by different facts.

With modern business transactions being so numerous and complex, the litigations as to fraud actions have given rise to many cases of marked similarity that have been decided in what appears to be a contradiction of other cases.

The case of *Marsh v. Falker* 40 N.Y. 562 (1869) is very similar to *Hadock v. Osmer, supra,* and *Abel v. Paterno, supra,* and yet was decided differently than these cases. In *Marsh v. Falker,* supra, the plaintiffs took notes of one Kahn relying on the defendant's statement that Kahn was good for $17,000 or $18,000 in property in Syracuse. Relying on this statement the plaintiff sold Kahn goods and took his notes. The property was so heavily encumbered that Kahn was penniless. The court held that this was not fraud.

Daniels, J. in his opinion said, "In order to determine whether representations of actual knowledge of the existence of material facts be deceitfully or fraudulently made, or whether that may be properly and fairly inferred, regard must be had to the transaction in which they are made, and to the subject to which they relate. . . ." The court continued to say that "The possession of actual knowledge is exceedingly rare and exceptional, and when representations are made concerning them, they are usually understood as amounting to no more than the candid and sincere convictions of the person making them. They are expressions of opinion or judgment, rather than absolute representations of fact, . . . , though they afterwards turn out to be wholly unfounded and untrue." *Marsh v. Falker* 40 N.Y. 562, 567.

Statements of present intent with intention to deceive upon something to happen in futuro must be distinguishable from a promise which even if broken is not actionable. *Adams v. Gillig* 131 App. Div. 494, 115 N.Y.S. 999 (1909).

Expressions as to financial conditions and what the defendant's company could pay in stock dividends are mere opinions. *Hatten v. Cook* 166 N.Y. 257, 59 N.E. 820 (1901). A distinction must be observed between a mere assurance that something will be done in the future and a present intention not to act on such assurances. *Adams v. Clark* 239 N.Y. 403, 146 N.E. 642 (1925).

Where representations consist in mere expressions of hope and expectations, the party to whom they are made is not legally justified in relying upon them and assuming them to be true.

The case at bar presents no new principles of law. The opinion is one which has been followed consistently in the law of deceit and fraud. It does, however, point out the problems and the difficulties as to what statements in business transactions amount to actionable fraud and what are matters of mere opinion.

T.N.P.

VEHICLE AND TRAFFIC LAW—INTERPRETATION OF

The Court of Appeals of New York has recently ruled on the interpretation of section 20 (subd. 4 par. a) of the VEHICLE AND TRAFFIC LAW. Pertinent parts of that section read as follows: "4. Unlicensed operators or chauffeurs cannot drive motor vehicles. a. . . . ; nor shall any person *knowingly authorize or permit* the operation or driving of a motor vehicle owned by him or in his charge upon a public highway of this state by any person who is not duly licensed under this chapter to so operate or drive a motor vehicle. . . ." (Emphasis added.) In ruling on the interpretation of the word "knowingly" in the statute the court said, ". . . in an instance where the word 'knowingly' is used in a criminal statute—as it is here—it is incumbent upon the prosecution as part of its case, to prove knowledge of facts on the part of the accused sufficient to 'constitute the act or omission a crime.' . . ." *People v. Shapiro,* 4 N.Y. 2d 597, 152 N.E. 2d 65, 170 N.Y.S. 2d 712 (1958). Since the people failed to offer or prove any facts showing that defendant, in this case, knew the driver of his car was unlicensed, the court of appeals affirmed the order of the appellate division granting a new trial.

In this case the facts are undisputed. Defendant was convicted in the City Magistrates' Court of the City of New York. The only witness in the case was the complainant, a police officer. While on motor patrol duty at about 2:30 a.m. on January 14, 1957, the officer observed a car proceeding north bound in a southerly lane on Bruckner Boulevard in the Bronx. He overtook the car and stopped it. One Juan Fortan was driving the car. On questioning the patrolman learned that Fortan was an unlicensed operator. He issued a summons to Fortan for driving the wrong way on a one way street and for driving without a license. Sitting next to Fortan was the defendant. The officer questioned the defendant and learned that the vehicle belonged to him. A summons was then issued by the patrolman to the defendant for a violation of section 20 (subd. 4 par. a) of the VEHICLE AND TRAFFIC LAW. The above facts were testified to at the trial. A motion was then made by the defendant to dismiss the information on the ground that the People had not made out a prima facie case. This motion was denied by the trial judge and the defendant was found guilty. The appellate division reversed this judgment of conviction, on the law, and ordered a new trial, holding that the people failed to offer any facts showing that the defendant knew the driver of the car was an unlicensed driver. *People v. Shapiro,* 5 App. Div. 2d 821, — N.Y.S. 2d — (1958).

In affirming the decision of the appellate division the court of appeals, in an opinion by Chief Judge Conway, first pointed out that the violation of which the defendant was convicted is specifically declared to be a misdemeanor by § 70 (subd. 1) of the VEHICLE AND TRAFFIC LAW, and, therefore, the criminal rules of presumption of innocence and necessity of proof beyond a reasonable doubt have to apply. *People v. Hildebrandt,* 308 N.Y. 397, 126 N.E. 2d 377, 129 N.Y.S. 2d 48 (1955); *People v. Strong,* 294 N.Y. 930, 63 N.E. 2d 119, 53 N.Y.S. 2d 941 (1945); *People v. St. Germain,* 302 N.Y. 580, 96 N.E. 2d 891 (1951).

The court then reasoned that if such a violation is a misdemeanor the definition to be applied to the word "knowingly" must be that of the PENAL LAW. Section 3 (subd. 4) of the PENAL LAW defines "knowingly" as follows: "The term 'knowingly' imports a knowledge that the facts exist which constitute the act or omission a crime, and does not require knowledge of the unlawfulness of the act or omission;" case law interprets the definition of "knowingly" as meaning that the perpetrator has to have a knowledge of all the essential facts which constitute the crime. *People v. Ahrend Co.,* 308 N.Y. 112, 123 N.E. 2d 799, 131 N.Y.S. 2d 507 (1954);

People v. Curtis, 217 N.Y. 304, 112 N.E. 54, 153 N.Y.Supp 1132 (1916); *People v. Rosenthal,* 197 N.Y. 394, 90 N.E. 991, 118 N.Y.Supp 1132 (1910); *People v. McHugh,* 271 App. Div. 135, 63 N.Y.S. 2d 319 (1946); *People (Mattus) v. Dropkin,* 261 App. Div. 223, 25 N.Y.S. 2d 16 (1941); *People v. Steele,* 179 Misc. 587, 37 N.Y.S. 2d 199 (Sup. Ct. 1942). It logically follows, the court said, that the prosecution has the burden of proving that the defendant had knowledge of such facts sufficient to make the act a crime. One such fact, the court concluded, is actual knowledge on the part of the defendant, or circumstances from which it could reasonably be inferred, that the driver was unlicensed.

The Court also discussed the point that the word ''knowingly'' in the statute should be construed to modify only the words ''authorize or permit'' which immediately follow it. This the court held to be incorrect. Penal statutes are to be strictly construed against the People and in favor of the accused. If the court were to hold that the word ''knowingly'' modifies only those words which immediately follow it, it would be construing the statute in favor of the People. The word ''knowingly'', therefore, must be held to modify the whole sentence in which it appears. *People v. Shapiro,* 4 N.Y. 2d 597, 152 N.E. 2d 65, 170 N.Y.S. 2d 762 (1958).

Judge Burke dissented in an opinion in which there were two main points. The first was that there was a need for the Legislature to provide for the instance when the owner entrusted the vehicle to an agent and he in turn permitted a third party to operate the vehicle. Therefore the Legislature inserted the word ''knowingly'' as a proviso, to protect the owner when the vehicle was operated by an unauthorized person. His second point was that to interpret the statute so as to make knowledge of the fact that the driver was unlicensed an essential element of the crime, would be overlooking the intent of the Legislature and attributing to it the intention of enacting a self-defeating law. The Legislature's enactments may not be interpreted so that the objects of the Legislature are defeated. *People v. Bell,* 306 N.Y. 110, 115 N.E. 2d 821, 125 N.Y.S. 2d 117 (1953). Nor may a statute be construed so that it leads to an absurdity. *People v. Jaehne,* 103 N.Y. 182, 8 N.E. 374 (1886).

The People, in this case, urge one point on appeal. They claim that they were not required to prove the defendant had knowledge that the operator of his vehicle was unlicensed because the statute should be construed as imposing a duty upon the owner of a vehicle to inquire whether the person is licensed before permitting him to drive. This is not true. The word "knowingly" in a statute does not carry with it any obligation of inquiry unless there is notice of facts which, though not conclusive of knowledge, warrant inquiry. *People v. Wilson,* 151 N.Y. 403, 45 N.E. 862 (1897); *People v. Dowling,* 84 N.Y. 478 (1881).

One of the leading cases on the application of the statutory definition of the word "knowingly" (PENAL LAW § 3 (4)) is a recent decision, *People v. Ahrend Co.,* supra. In this case appellant was an officer of defendant corporation, the sole manager, and the actual owner. He was convicted of violating section 1272 of the PENAL LAW. The portion of the PENAL LAW under which appellant was convicted reads as follows: ". . . and the officers of any such corporation who *knowingly permit* the corporation to violate the labor law by failing to pay the wages of any of its employees in accordance with the provisions thereof are guilty of a misdemeanor, ..." (Emphasis added.) After conviction in a Court of Special Sessions, the appellate division affirmed and an appeal was taken to the court of appeals. The court of appeals affirmed the judgment. It was held that while "knowingly" means a "knowledge of the existence of the facts constituting the crime," the defendant in his relationship to the corporation certainly knew that the workingmen were unpaid. *People v. Ahrend Co.,* supra.

A strong dissent was registered in this case by Judge Van Voorhis. He based his argument on the fact that the People had not shown that the appellant knew the employees were unpaid and had permitted them to go unpaid.

At first glance it seems as if this case supports the contention of the People in the principal case, that knowledge on the part of the defendant is not essential to the crime. A closer look at the case, however, reveals that at the trial in *People v. Ahrend Co.,* supra, the prosecution introduced evidence from which it could be inferred that appellant had knowledge of the fact that the employees were unpaid, and Judge Van Voorhis was speaking of a different type of knowledge; guilty knowledge or evil intent. Thus this case falls in line with *People v. Shapiro,* supra, in that it is necessary for the People to prove knowledge of facts constituting the crime or circumstances from which knowledge can be inferred, but not that he knew such facts constituted a crime.

This specific question, arising under section 20 (4) par. a, has been before the courts of this state but three times before the principal case. *People v. Asselta,* 1 App. Div. 2d 960, — N.Y.S. 2d — (1956); *People v. Crean,* 206 Misc. 311, 136 N.Y.S. 2d 688 (Magis. Ct. New York City 1954); People v. Tompkins, 202 Misc. 147, 114 N.Y.S. 2d 297 (Westchester County Ct. 1952). Each case is referred to in the opinion of Chief Judge Conway. The court takes notice of the fact that although none of the cases were binding upon them, "the reasoning of each case is persuasive and, in our opinion correct." All three cases hold that some proof of knowledge that the driver was not duly licensed is essential to the People's case.

The first case in which this question was presented to the courts was *People v. Tompkins,* supra. A judgment of conviction was rendered by a Court of Special Sessions of the Town of Cortlandt on defendant's plea of guilty. On appeal to the county court of Westchester County, the defendant contended that the judgment should be reversed on two grounds, namely: (1) that a written information was not made against him, and such was not waived by a plea of guilty, and (2) that the facts orally charged against him were insufficient to constitute a violation of section 20 (4)a. The court decided the first contention in favor of the defendant; but did so by basing its finding on rather unstable reasoning. Realizing this, the court went on to consider defendant's second argument.

The Justice of the Peace informed the defendant that he was charged "with a violation of Section 20, (4)a of the VEHICLE AND TRAFFIC LAW, in that he permitted the operation of a motor vehicle owned by him by a person not duly licensed to drive." There was no oral allegation that the defendant knew the person allowed to drive was unlicensed. This, the court said, was fatal to the People's case. No person, the court continued, can be found to be a violator of the section in question unless it is shown that he permitted or authorized one, whom he knew not to be duly licensed, to operate his vehicle. The court, therefore, reversed the judgment of conviction and ordered the charge dismissed. No appeal was taken by the People.

This question arose again two years later in *People* v. *Crean,* supra. In this case the defendant was convicted in a Court of Special Sessions held by the Police Justice of the Village of Bronxville. The Police Justice held that the defendant was under a legal obligation to inquire as to whether the person to whom he entrusted his car was duly licensed to operate a motor vehicle. At the trial the prosecution offered no evidence from which it could be inferred that defendant had knowledge. The court on appeal held: It was incumbent upon the prosecution to prove: (1) that the defendant authorized or permitted a person to operate his motor vehicle; and (2) that the defendant had knowledge that the person he authorized or permitted to operate his motor vehicle had no license.

The word "knowingly", the court said, means more than carelessness or failure to make inquiry. Continuing, the court quoted the statutory definition of "knowingly", (PENAL LAW § 70 (4)a) and said that since knowledge is an essential element of the crime by statute, it must be alleged and proved. In concluding its argument the court said that the statute did not place upon the owner of a motor vehicle the duty of making an inquiry to ascertain that the person whom he allowed to operate his car was a duly licensed driver. The judgment of conviction was reversed and the information dismissed by the county court.

In the principal case the court of appeals, after stating that it was in agreement with the reasoning of the three cases in which the question had previously arisen, quoted from the reasoning and conclusions of the county court in the *Crean* case as summarized above.

The third case, *People* v. *Asselta,* supra, was decided in the appellate division in 1956. A judgment was rendered convicting defendant by the city magistrate sitting as a Court of Special Sessions of the City of New York. On appeal it was found that the defendant was charged with violating the wrong section of the VEHICLE AND TRAFFIC LAW in that the vehicle involved was a motorcycle. He should have been charged with violating subdivision 2 section 41 of the VEHICLE AND TRAFFIC LAW, which is similar to section 20 and applies to motorcycles. This was not the sole basis of the court's decision, however. The court went on to say that regardless of the fact defendant was charged under the wrong section no conviction could be upheld since there was no proof, nor was there any evidence from which it could be inferred that defendant had knowledge the person operating the motorcycle was unlicensed. Such evidence was essential to sustain a conviction. The judgment was reversed and the information dismissed.

In reaching the decision in the principal case the court took the stand that since this violation was specifically designated as a misdemeanor, the statutory definition of the word "knowingly" in the PENAL LAW supra should apply. In applying this definition the court relied heavily on the rationalization of the three cases discussed above, especially the *Crean* case. Although the court was not bound by such decisions, as it so stated, it found their reasoning to be logical and persuasive.

H. L. T.

Digest of Current New York Decisions

CONSTITUTIONAL LAW

Defendants established a community college pursuant to article 126 of the Education Law and admitted non-residents with certain limitations. Plaintiff, a taxpayer, challenges the constitutionality of article 126 as repugnant to section 2 of article VIII of the state constitution which states that "No county . . . shall contract any indebtedness except for county . . . purposes." He alleges that attendance of non-resident students does not serve a county purpose. *Held:* The statute is constitutional. The establishment and maintenance of a community college is a county purpose. The statute was not designed to completely separate local county interests from all others. The fact that non-residents are in attendance does not justify the conclusion that county funds are expended in excess of its own local interest, since a larger state interest is also served. *Grim v. County of Rensselaer,* 4 N.Y. 2d 416 (June, 1958).

CONSTITUTIONAL LAW

Appellant was convicted of violating a Dunkirk City Ordinance providing, among other things, that "No person shall lounge or loiter about any street or street corner in the City of Dunkirk." He contends that the language is too vague, indefinite and uncertain to define a crime and that the ordinance also fails to provide any standards to test the prohibited conduct. *Held:* Judgment of conviction reversed. The ordinance fails to distinguish between conduct "calculated to harm and that which is essentially innocent." "Loiter" has acquired a common meaning; but a citizen is not adequately informed of its criminal implications when it is arbitrarily enforced. *People v. Dios,* 4 N. Y. 2d 469 (June, 1958).

CORAM NOBIS

Defendant was indicted for burglary in June, 1950, and for robbery and larceny in September of the same year. After being released from New York State Vocational Institution in September, 1953, defendant was indicted for robbery and for criminally receiving stolen property on March 4, 1955. Arraigned on these indictments and also on the one returned in September, 1950, he pleaded not guilty to all of them. Five days later, he pleaded guilty to one count of the indictment, charging him with receiving stolen property, and he was sentenced to prison. Defendant brought this coram nobis proceeding claiming that his conviction had been obtained by ''trickery and coercion'' in that an assistant district attorney stated that if he failed to plead guilty, all of the indictments would be brought on for trial at once. *Held:* The facts alleged by the defendant amount to coercion in the procurement of the plea and, if proven, entitle him to coram nobis relief. Resort to this writ is justified if it appears that a prosecuting official threatened to revive five-year-old indictments and see to it that the punishment inflicted would be made more severe if a plea of not guilty was entered. Where one alleges facts which, if established, justify a writ of coram nobis, ''he is entitled to a hearing unless his claims are conclusively refuted by unquestionable documentary proof.'' Defendant is entitled to a hearing and an opportunity to produce his proof. *People v. Picciotti,* 4 N. Y. 2d 340 (May, 1958).

DOMESTIC RELATIONS

The mother of a child born out of wedlock consented to the child's adoption and stated she had no religious preference.

A year later she attacked the adoption alleging that she had not given her consent and that the foster parents were not of the same religious faith as the child, as required by law. *Held:* The court determined that the mother's lack of concern for the child and her conduct amounted to abandonment. Abandonment is an exception to section 111 of the Domestic Relations Law requiring consent of the mother to the adoption of a child. Although the Social Welfare Law provides that the faith of the foster parents be that of the adopted child "when practicable," this is not to be considered an absolute requirement. *Matter of Maxwell,* 4 N.Y. 2d 429 (June, 1958).

DRAINAGE OF SURFACE WATERS

Plaintiff and defendant own adjoining lots, defendant's parcel being at a higher elevation. Water coming from defendant's lot damaged personal property in plaintiff's basement. This did not take place while defendant's land was unimproved, but the seepage occurred when it was being improved for a gasoline station. The level of the upper lot was raised in making the improvement, causing damage to merchandise in the cellar of plaintiff's store. *Held:* Under the common law adopted in New York, either proprietor can improve his land in any manner without being liable to the abutting owner for change in the flowage of surface water if drains, pipes or ditches are not used. As the improvements were made in good faith to fit the property and the water was not drained by means of pipes or ditches, there is no liability on defendant. "Where, as here, it is diffused surface water, neither party is prevented from improving his parcel of land regardless of what becomes of the surface water." *Kossoff v. Rathgef-Walsh, Inc.,* 3 N. Y. 2d 583 (January, 1958).

EXECUTION

Plaintiff judgment creditor seeks to levy under section 687-a of the Civil Practice Act ("Levy upon and collection of debts and causes of action arising out of contract") against the salary of an employee of defendant. Plaintiff appeals from an order denying his motion for leave to sue under subdivision 6 of section 687-a. *Held:* Order affirmed. The property referred to in section 687-a is in the nature of "debts or causes fixed, positive and definite in time and scope which were owed to or were the rights possessed by the debtor at the time of the levy." Salary payments subsequent to the time of the levy do not fall within this classification. *Shamboch v. General Electric Company,* 6 App. Div. 2d 327 (3d Dep't July, 1958).

INSURANCE

Defendant insurance company issued to plaintiff a liability policy on his tractor-trailer effective September 16, 1955. The policy provided that it might be cancelled by the mailing of a written notice to the defendant "stating when thereafter the cancellation shall be effective." Plaintiff telephoned his insurance broker that he no longer needed the policy and was told to send it to the broker for forwarding to defendant for cancellation. In accordance with these instructions he sent the policy to the broker. Upon receipt of it by the broker, the words "Cancel 10/14/55" were written in ink across the face of the policy and on that same day the broker mailed it to defendant with a letter stating it was enclosed for cancellation. The letter and policy were received by defendant on October 17, 1955 at 9:00 A.M. An accident in which the tractor-trailer was involved intervened between the mailing of the policy and its receipt by defendant. Plaintiff claims that the policy was in effect when the accident occurred. *Held:* The policy was cancelled prior to the accident and was, therefore, not in effect at such time. The parties made their own agreement as to how and when the policy should be cancelled. It is impossible to read the above provision for cancellation by the insured as having any meaning other than that such a mailing would produce cancellation on the date specified in the notice. The word "thereafter" in the clause meant only that the policy holder could not select a cancellation date prior to the date on which the notice was sent. The letter sent by the broker mentioned no date, but the words written on the policy could mean nothing except a direction to the defendant that the cancellation be as of October 14, 1955. *Nobile v. Travelers Ind. Co.* 4 N.Y. 2d 536 (June, 1958).

LABOR LAW

Plaintiff is a domestic employed by defendants. In her amended complaint, she alleges that she fell from a stepladder while cleaning storm windows outside of defendants' private residence and that the injury suffered was due solely to defendants' violation of section 240 of the Labor Law with respect to necessary support and safety devices to be furnished by a person employing or directing labor of persons engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure. . . ." *Held:* The word "cleaning" used in context, refers to the "cleaning" incidental to building construction, demolition and repair work and not to cleaning of windows of private dwellings by a domestic. The legislature had no intent to include domestics within section 240. *Connors v. Boorstein,* 4 N. Y. 2d 172 (April, 1958).

LANDLORD AND TENANT

Plaintiff leased certain premises to defendant for a period of years. Under the terms of the lease, defendant was to pay plaintiff a fixed annual rent and a certain percentage on gross sales as an additional rent. Prior to expiration of the lease defendant vacated the premises and moved its operation across the street. Defendant paid the annual rent for the balance of the lease but refused to pay any percentage rental. Plaintiff landlord alleged a breach of an implied covenant to remain in possession. Defendant moved for summary judgment. *Held:* Defendant's motion for summary judgment granted. A tenant is not obligated to pay any percentage rental for the balance of the term under these circumstances. No triable issue of fact was raised by plaintiff as to an implied covenant to remain in possession. There was no evidence to indicate that a covenant to remain in possession was so intended by the parties that its exclusion from the express agreement can be overlooked and such a covenant implied. *Tuttle v. Grant Co.* 5 App. Div. 2d 370 (4th Dep't March, 1958).

MASTER—SERVANT

Plaintiff was shot by defendant patrolman while being searched as a narcotics carrier. Defendant was off duty, in civilian clothes, and in a different precinct area at the time of the event. Defendant city of New York claims it is not liable because defendant patrolman was not acting within the scope of his employment at the time of the event in question. *Held:* Due to the peculiar nature of a policeman's employment, he does not cease to be an employee when his tour of active duty ends. A policeman is on call 24 hours a day and subject to duty at all times. ''It cannot be contended that an officer, not on active duty nor assigned to the narcotic squad, is without authority to arrest a narcotic violator or even a narcotic suspect.'' The question of the scope of defendant's employment, his intent and whether the act was done on his master's behalf are questions for the jury. As a matter of law, it cannot be said that the defendant city is or is not liable. The jury must determine if there is any evidence that defendant patrolman acted within the scope of his employment or if the act was done with the express or implied authorization of his master. *Burns v. City of New York,* 6 App. Div. 2d 30 (1st Dep't May, 1958).

NEGLIGENCE

The 10-year-old infant plaintiff was injured in a fall from the bleachers in the school playground area. Plaintiff had jumped from the highest tier of the bleachers, a distance of about 5 feet, on many previous occasions; but this time she caught her foot and was injured. No teacher was supervising the immediate play area at this time or at any previous time. Defendant school board claims the act was unforeseeable and the lack of supervision of the play area was not the proximate cause of the accident. *Held:* The duty of the school board under section 1709 of the Education Law to provide adequate supervision within the schoolyard is unqualified and mandatory. Had there been adequate supervision in the past the danger of the bleachers to the children would have been discovered and steps could have been taken to prevent such accidents. The infant was not guilty of contributory negligence as a matter of law. *Decker v. Dundee Central School District,* 4 N.Y. 2d 462 (June, 1958).

NEGLIGENCE

Plaintiff's intestate was killed when his vehicle collided with defendant's train at a railroad crossing. Evidence established that the crossing signals were operating at the time of the accident, that no obstructions existed to a clear view of the tracks and that the driver-intestate was contributorily negligent. The case went to the jury on the "last clear chance" doctrine. *Held:* In order to invoke the doctrine of last clear chance the defendant must have knowledge of another's state of present peril and have the last clear chance to avoid the accident. Here, the proof failed to show that the engineer of the train had knowledge of intestate's peril and that he could reasonably have done anything "to avert the ensuing catasthophe." The verdict in favor of plaintiff was contrary to the weight of the credible evidence. However, the lower court failed in its charge on the doctrine of last clear chance sufficiently to direct the attention of the jury to the conflicting testimony of plaintiff's and defendant's witnesses as to the distance from the crossing that defendant's engineer could or should have realized that intestate was not going to stop. Therefore, the jury failed to adequately consider the credibility of the opposing witnesses upon this relevant point. Judgment reversed and a new trial ordered. *Vadell v. Long Island Railroad Co.*, 6 App. Div. 2d 88 (1st Dep't June, 1958).

PRE-TRIAL EXAMINATION

Co-defendants were involved in a personal injury tort action in which no cross complaints had been served and where no special circumstances had been asserted. One defendant served a notice of examination before trial on the other, which was objected to as not being a procedure authorized between co-defendants. *Held:* Co-defendants may examine each other before trial. A reasonable interpretation of section 288 of the Civil Practice Act which provides for taking depositions before trial would sustain an examination by one defendant of another defendant, since examination would be material and necessary to his defense. This decision clearly extends the permissive scope of examinations before trial in the First Department to include co-defendants. *Schneider v. Doyle,* 6 App. Div. 2d 122 (1st Dep't July, 1958).

SERVICE OF PROCESS

A process server with a court order authorizing substituted service of summons and complaint under section 231 of the Civil Practice Act was prohibited by a doorman from reaching defendant's apartment in a large apartment house. The server exhibited the substituted order, summons and complaint to the doorman, and put the papers around "the knob of the entrance of the door" of the apartment house after being informed that the superintendent was not present. Upon defendant's motion on special appearance to vacate the service, the court below directed a reference to hear and report. The official referee reported that substituted service was not made in accordance with section 231 of the Civil Practice Act. *Held:* When the only person found on the premises in which a defendant lives refuses to aid a process server and he is uncooperative to the steps taken to effect service, the server need not tender such a person a copy of the papers. When he attaches the papers to the outside door, the process server does what the statute and order permit to be done. Order and judgment vacating the service reversed. *Merchandise National Bank of Chicago v. Lister,* 5 App. Div. 2d 653 (1st Dep't May, 1958).

TAXATION

Plaintiff, a domestic corporation, sells beer to wholesale and retail distributors. Sales to out-of-state distributors are made in Brooklyn, the purchaser supplying a truck at plaintiff's brewery in Brooklyn. Under protest, plaintiff paid a tax for the privilege of carrying on business within New York City on gross receipts that included sales to out-of-state purchasers. *Held:* New York City can tax receipts from sales by a local concern to out-of-state customers where delivery of the goods is made in the city. As it is a local transaction, it is immaterial "that the goods are to be transported out of the city immediately on delivery.'' The tax in question is not one upon interstate commerce and does not violate the commerce clause or the fourteenth amendment. *Matter of Schaefer Brewing Co. v. Gerosa,* 4 N.Y. 2d 423 (June, 1958).

TAXATION

Chapters 245 and 287 of the laws of 1954 both amended chapter 148 of the laws of 1952. Chapter 245 gave the county of Saratoga the power to tax general admissions to harness horse races. Chapter 287 provided for the imposition of a tax on *all* admissions (rather than only general admissions), thereby increasing the tax base. Both chapters passed the legislature on the same day, but chapter 287 was not signed by the governor until three days after chapter 245 was signed. Chapter 852 of the laws of 1957, which also amended chapter 148 of the laws of 1952, extended the power to tax admissions to harness races to cities of 100,000 or less. Under this chapter the city of Saratoga Springs was given the power to tax the race meetings.

Defendant racing association contends that chapter 287 is inconsistent with chapter 245 and, therefore, impliedly repeals chapter 245. Defendant also contends that since chapter 852 of the laws of 1957 makes no reference to chapter 245, this then constitutes legislative recognition of an implied repeal of chapter 245 by chapter 287. *Held:* A strong presumption exists against repeals by implication, especially where the laws have been enacted at the same legislative session. Chapters 245 and 287 relate to wholly different subject matters. They are not inconsistent, and repeal of the former by the latter will not be implied. Each should be accorded independent and concurrent effect. The failure of chapter 852 of the laws of 1957 to refer to chapter 245 does not constitute repeal by implication since chapter 852 had nothing to do with chapters 245 and 287 of the laws of 1954. *County of Saratoga v. Saratoga Harness Racing Association,* 4 N.Y. 2d 622 (June, 1958).

UNEMPLOYMENT INSURANCE

Claimant left her employment with defendant to get married. Shortly thereafter she returned to the labor market and accepted the first suitable employment. Defendant claims that leaving one's job to get married is not a ''voluntary separation'' from employment for good cause under section 593 of the Labor Law and, therefore, the 42-day disqualification from unemployment benefits is applicable. *Held:* A temporary withdrawal from the labor market to get married is good cause within the scope of section 593. The 42-day disqualification period does not apply. Claimant is disqualified from receiving benefits only until there has been a bona fide return to the labor market, at which time her disabilities cease. *Matter of Shaw,* 6 App. Div. 2d 354 (3d Dep't July, 1958).

Legislation

REAL PROPERTY LAW

Section 346–Section 347—New—Extinguishment of Nonsubstantial Restrictions—Effect of Certain Special Limitations and Conditions Subsequent.

Two new sections, Section 346 and 347 were inserted into the Real Property Law by Chapter 864 of the Laws of 1958.

Section 346 provides that no restriction on the use of land created at any time by covenant, promise or negative easement or created on or after September 1, 1958 by a special limitation or condition subsequent, shall be enforced by injunction or judgment compelling a conveyance of the land burdened by the restriction or an interest therein. This section further provides that such restriction shall not be declared or determined to be enforceable if the restriction is of no actual and substantial benefit to the persons seeking its enforcement.

Under Section 347, no reverter or right of entry shall accrue by reason of a special limitation or breach of a condition subsequent which restricts the use of land. An exception is made if the special limitation or condition subsequent creates a possibility of reverter or right of entry conditioned upon an event other than a breach of a restriction, whereby this section applies only when the right of entry or possibility of reverter is conditioned upon breach of an express or implied restriction on the use of land. Upon the happening of such a breach, an action may be maintained in Supreme Court to compel a conveyance of land or to protect a substantial interest therein which is subject to the special limitation or condition subsequent.

These sections codify the doctrines under which promissory restrictions on the use of land may be denied enforcement or extinguished upon payment of damages.

This act took effect on September 1, 1958.

R. T. R.

REAL PROPERTY LAW

Section 345—New—Recording of Declaration of Intention to Preserve Restrictions on the Use of Land.

Chapter 865 of the Laws of 1958 amends the Real Property Law by adding a new section, Section 345, providing for the recording of ''Declaration of Intention to Preserve Restrictions on the Use of Land.'' With specified exceptions, a condition subsequent or special limitation restricting the use of land and the right of entry and possibility of reverter created thereby shall be extinguished and become unenforceable unless within 30 years from the creation of the condition subsequent or special limitation, a declaration of intention to preserve restrictions as to the use of land is recorded. A renewal declaration may be recorded at 10 year intervals. This section includes a saving clause with respect to restrictions which were created prior to September 1, 1931 and which may be recorded on or before September 1, 1961.

If a person fails to record a declaration of his intention to preserve restrictions on the use of land within 30 years from the creation of the restrictions, under Section 345, such restrictions would become unenforceable, and an owner of property to whom the restrictions formerly applied, would no longer be affected by them. Thus an owner of land is protected against ancient restrictions on the use of his land.

This act took effect on September 1, 1958.

R. T. R.

REAL PROPERTY LAW

Section 348—New—Action to Limit the Possibilities of Reverter and Rights of Entry.

The Real Property Law is amended by Chapter 866 of the Laws of 1958 adding a new section, Section 348, which establishes a means of relief against existing restrictions created by a special limitation or condition subsequent which unreasonably limits the use and development of land.

If the court finds that the primary purpose of the special limitation or condition subsequent was to unreasonably limit the use and development of the land or unreasonably impair the certainty of titles, it will grant relief. Relief would not be available where it appears that a breach of the restriction occurred before the action was brought. A possessory estate or right of entry is extinguished unless the action to recover possession or enforce the right of entry is asserted in the same action or within 6 months from entry of judgment.

This amendment confers on the court discretionary power to adjudge that the special limitation or condition subsequent be governed by Sections 346 and 347 of the Real Property Law which apply to restrictions on the use of land that are created on or after September 1, 1958.

This act took effect on September 1, 1958.

R. T. R.

VEHICLE AND TRAFFIC LAW

Sections 52, 52-a—Amended—Service of Summons on Nonresident Motorists.

Chapter 568 of the Laws of 1958 amends Section 52 of the Vehicle and Traffic Law by extending the application of its provisions for substituted service on nonresident motorists. Under the former narrow construction of the word ''operation'' in Section 52, its provisions for substituted service were not applicable to: (1) the nonresident, non owner principal in whose business the vehicle was being operated or (2) the nonresident owner where the accident arose out of the ''use'' as distinguished from the ''operation'' of the vehicle being operated with his consent. [Though he was liable under the broader construction of ''operation'' as used in Section 59 of the Vehicle and Traffic Law (Elfeld v. Buckham Renting Co., 299 N. Y. 336, 87 N. E. 2d 285)]. This amendement includes ''use'' as well as ''operation'' of a vehicle with the ''permission'' of the nonresident and renders the nonresident amenable to service whenever the vehicle is used or operated in his business, whether he is the owner or not.

The act amends Section 52-a of the Vehicle and Traffic Law by providing that the provisions of Section 52 relating to service upon the personal representative of a nonresident also apply to the personal representative of a resident who departs from the state and remains absent therefrom for thirty days, continuously.

This act took effect July 1, 1958.

E. C. W.

VEHICLE AND TRAFFIC LAW

Section 59—Amended—Section 59-a—Repealed—Liability of Owner of Motor Vehicle.

Chapter 577 of the Laws of 1958 repeals Section 59-a and amends Section 59 of the Vehicle and Traffic Law. Their purpose is: (1) to delete the limitation to operation of a motor vehicle or motor cycle ''upon a public highway'' and extend its application to use or operation ''in this state.'' (2) to clarify the definition of ''owner'' by combining the clause in Section 2 of the Vehicle and Traffic Law, under which ''owner'' also includes any lessee or bailee of a motor vehicle or motor cycle having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days, with the provision in Section 128 of the Vehicle and Traffic Law where ''owner'' is defined as a person, other than a lien holder, having property in or title to a vehicle. Section 59 now provides that the liability of the two persons described above shall be joint and several. (3) to modify the provisions concerning trailers and semi-trailers by providing that when vehicles are used in combination, by attachment or tow, the person using or operating any one vehicle shall be deemed to be using or operating each vehicle in the combination, with the owners jointly and severally liable.

By this act subdivision 2 of Section 167 of the Insurance Law is also amended by adding the words ''or of any vehicle as defined in Section 59 of the Vehicle and Traffic Law'' making it clear that the term ''motor vehicle'' as used in Section 167 of the Insurance Law includes all vehicles as defined in Section 59 of the Vehicle and Traffic Law.

This act took effect July 1, 1958.

E. C. W.

Election of Certain Small Business Corporations as to Taxable Status

Technical Amendments Act of 1958

Internal Revenue Code
Subchapter S

Thomas C. Plowden-Wardlaw *

Introduction

(a) *In General*

On September 2, 1958 the Technical Amendments Act of 1958 became law.[1] Included in the Act were provisions entitled "Election of Certain Small Business Corporations as to Taxable Status," now known as Subchapter S of the Internal Revenue Code.[2]

The purpose of these provisions is to permit "businesses to select the form of business organization desired, without the necessity of taking into account major differences in tax consequences."[3]

The legislation was intended to complement the provisions in the 1954 Code permitting partnerships and proprietorships to be taxed like corporations.[4] Provisions somewhat similar to Subchapter S, but applicable only to new corporations were proposed for the 1954 Code, but not enacted.[5]

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[1] 72 Stat. 1606.

[2] Int. Rev. Code, Sections 1371–1377.

[3] Senate Rep. No. 1983, 85th Cong. 2nd Sess. (1958).

[4] Ibid.

[5] Sen. Rep. No. 1622, 83rd Cong. 2nd Sess. 452 (1954).

The philosophy underlying the legislation clearly appears in the language of the Senate Finance Committee report:[6] "... permitting shareholders to report their proportionate share of the corporate income, in lieu of a corporate tax, will be a substantial aid to small business. It will be primarily beneficial to those individuals who have marginal tax rates below the 52 per cent corporate rate (or 30 per cent rate in the case of smaller corporations) where the earnings are left in the business. Where the earnings are distributed (and are in excess of what may properly be classified as salary payments), the benefit will extend to individuals with somewhat higher rates since in this case a 'double' tax is removed. The provision will also be of substantial benefit to small corporations realizing losses for a period of years where there is no way of offsetting these losses against taxable income at the corporate level, but the shareholders involved have other income which can be offset against these losses."

This is an important piece of legislation and counsel for every small corporation or partnership or proprietorship should review the affairs of his clients in the light of it.

However fashionable it has become for the sophisticated to shake their heads and look the other way, or for the unsophisticated to plunge headlong into the new election without a realization of the problems involved, the fact is that, in the proper circumstances, Subchapter S, with all its shortcomings, may prove the greatest boon taxwise since the advent of the marital deduction.[7]

(b) *Some of the advantages to taxpayers*

Often in the past, businessmen have found that doing business in the corporate form was too expensive taxwise. They can now operate in the corporate form without increase in tax expense and yet obtain many and valuable fringe benefits for themselves and their families. Such things as pension and profit sharing plans,[8] exempt sick pay, accident and health insurance, group life insurance, tax free reimbursement of medical expenses, $5,000 death benefits and salary continuation to widows, become available to stockholder-employees. These benefits are not available to proprietors or partners.

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[6] Note 3.

[7] 1939 Int. Rev. Code, Sec. 812(e).

Heretofore the Internal Revenue Code has effectively prevented the incorporation of personal service businesses.[9] A corporation which is a personal holding company because of a personal service contract can qualify under Subchapter S.[10] Thus a manufacturer's agent who has been denied the advantages of employee status may now become an employee of his own corporation with all the usual corporate advantages, including fringe benefits, but without running into the hurdle of the personal holding company act.

The problems of "unreasonable" or "unjustified" accumulation[11] are made easier by this legislation. Earnings, particularly of a new corporation, can be accumulated at the lowest corporate tax rate, at least to the extent of $100,000 [12] and probably considerably more than that, and then, if the limit has been reached, the corporation can elect under Subchapter S, and there can be no further problem.

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[8] In terms of potential capital appreciation, the difference between what an individual proprietor or partner in a successful venture can do as compared with an owner-employee is quite fantastic. Because contributions by the employer to such plans are tax deductible and the earnings of the plan are not subject to income tax, the accumulation of funds for the benefit of the owner-employee is at a rate many times as fast as he could ever have maintained as a partner or proprietor.

Another way of putting it is to say that in some instances Subchapter S has reduced the cost of personal life insurance by as much as 80%. Whereas it might have taken $1,000 of earnings before taxes of the partner or proprietor to purchase $4,000 of life insurance, it may be possible that the same taxpayer as an employee of a Subchapter S corporation can purchase ten times as much with the same $1,000.

[9] Int. Rev. Code, Sec. 543(5) defines personal holding company income to include "amounts received under a contract under which the corporation is to furnish personal services. . . ."

[10] This is a significant difference between the definition of personal holding company income in Section 1372(e)(5) and Section 543.

[11] Int. Rev. Code, Sections 531–537.

It is possible, too, that the difficult and complex problems of the collapsible [13] corporation are eased.[14]

Partial liquidations [15] and certain complete liquidations [16] will be more useful and more workable as a result of Subchapter S.

The advantage of reporting a sale on the installment basis can be preserved to a Subchapter S corporation during the period of the election. A common problem in the past has been how to prevent the imposition of two taxes—one at the corporate level and one at the shareholder level—when a corporation sold its assets to a buyer. This problem was aggravated where the buyer insisted on paying the price over a period of years, because, in order to avoid the double tax, it was necessary to liquidate the corporation and this automatically deprived the stockholders of the right to report the gain on the installment basis, so that they had to pay a tax on the full gain before they collected all the proceeds.[17] This right is now preserved. The Subchapter S corporation continues in existence. The gain is reported by the corporation and "passed through" [18] to the shareholders each year at the cost of only one capital gains tax.

If taxpayers have sufficient foresight, there may be great advantages in becoming a Subchapter S corporation for a limited time.[19] For instance, if the shareholders of an existing corporation believe that their corporation will realize a substantial long-term capital gain in the coming year, they can elect under Subchapter S. The corporation will pay no tax on the gain; it will be passed through to the stockholders at the cost of but a single tax.[20] Likewise, if the tax brackets of the shareholders are high, it may be advisable to pass a heavy nonrecurring operating loss directly to the shareholders to set off against their other income.[21] After the year in which the nonrecurring gain or loss is realized, the election can be terminated.

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[12] Int. Rev. Code, Sec. 535.

[13] Int. Rev. Code, Sec. 341.

[14] See P. 286 infra.

[15] Int. Rev. Code, Sec. 346, discussed at P. 289 infra.

[16] Int. Rev. Code, Sec. 337, discussed at P. 288 infra.

[17] Int. Rev. Code, Sec. 453.

[18] Int. Rev. Code, Sec. 1375, discussed at P. 277 infra.

A somewhat similar use of Subchapter S can be availed of where an individual or partner in high brackets may be anticipating a substantial nonrecurring item of income. By transferring to a corporation the assets which are expected to be going to throw off the income, he may be able thus to have that income subjected only to the lower corporate rates. After the year in which the income was realized he can switch to a Subchapter S corporation.

Another interesting possible use of the Subchapter S corporation is the not uncommon situation in which the real estate used by an operating company is owned by a separate real estate corporation. The shareholders may want more money out of the operating company, or the operating company may want to get rid of some of its accumulated earnings because of fear of unreasonable accumulation, or there may be reasons of mere business convenience for the transfer of the real estate to the operating company. The real estate company can elect under Subchapter S,[22] sell the real estate to the operating company, and pass through the gain to its shareholders. The shareholders will have received their money at the cost of but a single tax—at capital gain rates, the operating company will have acquired the real estate at a stepped-up basis and will have rid itself of some of its surplus accumulations.

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[19] As to terminations, see Int. Rev. Code, Sec. 1372(e), discussed at P. 261 infra.

[20] Int. Rev. Code, Sec. 1375, discussed at P. 277 infra.

[21] Int. Rev. Code, Sec. 1374, discussed at P. 270 infra.

[22] Provided it can meet the requirements of Int. Rev. Code, Sections 1371 and 1372.

The existence of a Subchapter S corporation may be valuable to its stockholders as a vehicle for spreading out the income over more than one year. A partner must report the income of the partnership in whichever of his tax years the partnership year ends. Thus a calendar year taxpayer must report in his 1959 income the income of his partnership for any partnership year that ends in 1959. It is no longer possible to create a partnership having a tax year different from that of the partners.[23] It is perfectly permissible, however, to create a Subchapter S corporation with a fiscal year different from the tax year of its shareholders.[24] It is therefore possible to postpone the taxable income of the Subchapter S corporation reportable by the shareholder until a year later. If A and B (on calendar years) create a Subchapter S corporation in February of 1959 on a fiscal year ending January 31st, none of the earnings of the corporation during 1959 need be included by them in their individual returns until their 1960 returns to be filed in 1961. However, if the corporation has earnings by December 31, 1959, a portion of these can be distributed, in which case the amount distributed will be included in the shareholders' 1959 income, while the undistributed portion will not be includible until 1960, thus spreading one year's income over two years.

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[23] Int. Rev. Code, Sec. 706.

[24] Quite apart from the ability to "spread" income described in the text, the availability of different taxable years as between a shareholder and his Subchapter S corporation means that the income tax advantages formerly available by means of partnerships, now prohibited by both the Code and the Regulations, have once more become obtainable.

Yet another advantage of a Subchapter S corporation is the opportunity it presents for family income splitting. Subject to the Commissioner's right to reallocate the income to reflect the true value of services rendered,[25] it would seem that the income can be divided up as between the members of the family by simply dividing up the stock.[26] Unlike a gift of a partnership interest, a gift of Subchapter S stock will carry with it income already earned even if the gift takes place on the last day of the year.[27]

(c) *Some of the problems and pitfalls*

Many of the most serious difficulties of shareholders of Subchapter S corporations are likely to arise as a result of unexpected and involuntary termination of the election.[28]

The death of a shareholder[29] may cause termination of the election either because a nonqualified entity may become a shareholder or because the new shareholder, even if qualified, does not consent to the election, or even if he wants to consent, fails to do so within the prescribed time limit.[30]

This requirement that an estate must consent to the election if it is to be preserved may present the executor or administrator with a difficult problem. He may not be willing to consent for the reason, amongst others, that his estate may be liable for income taxes on an entire year's profits[31] and yet receive no money from the corporation with which to pay them.[32] Moreover, the constructive dividend which must be reported by and taxed to the estate would not appear, under existing law, to qualify under Internal Revenue Code Section 691 relating to income in respect of a decedent. Therefore, to the extent that this dividend was includible in the estate for estate tax purposes, it will be subject to double taxation without the benefit of the deduction provided by Section 691(c).

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[25] Int. Rev. Code, Sec. 1375(c), discussed at P. 280 infra.

[26] See P. 280 infra.

[27] In the case of a calendar year corporation a gift of stock can be made in December, and apparently the donee will report the income for the entire year, including that realized by the donor during the time he held the stock.

[28] Int. Rev. Code, Sec. 1372(e), discussed at P. 261 infra.

[29] See discussion on P. 257 infra.

[30] Ibid.

[31] See Int. Rev. Code, Section 1373, discussed infra at P. 266, which provides that the persons who are shareholders on the last day of the corporation's taxable year must report their share of the corporation's

It may be advisable for shareholders in Subchapter S corporations to provide in their wills that their executors exercise the requisite consents or at least are authorized to do so without liability.

The requirements that a new shareholder must consent and that certain persons and entities cannot qualify for such consent may necessitate shareholder agreements designed to prevent shares from passing into the hands of nonqualified or nonconsenting shareholders. The uncertainties and complications of this sort of thing are obvious.[33]

Involuntary termination may cause trouble when no death is involved. There is the problem of "locked-in" earnings.[34] Retroactive termination may not only lock in undistributed earnings, but also subject the corporation to the corporate income tax and result in prior distributions being treated as dividends.[35]

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profits for the entire year. Where the corporation had a loss, the loss is apportioned between the decedent's final return and the estate's first return.

[32] The executor would have no recourse, apparently, to compel the directors to make an actual distribution of funds.

[33] There may be some question whether such agreements are enforceable. Even if they are, there are bound to be delays and 30 days is a short time in which to bring a suit for specific performance.

[34] Discussed at P. 282 infra.

[35] Thus a successful business which incorporated in the early part of the year and elected might find itself subjected to double taxation insofar

Net operating loss carryovers of existing corporations may be lost entirely by electing under Subchapter S.[36] Difficult problems involving distributions in kind are sometimes created.[37]

Little is yet known of the ramifications of electing under Subchapter S as such an election may affect taxation by the states. If states like New York, where individual rates are higher than corporate rates, adopt similar legislation, shareholders are likely to pay more state taxes than before. Similarly, in those states where a deduction is allowed for Federal taxes, the effect of electing may be to double the shareholders' state tax, since no deduction can be allowed to a corporation for a Federal income tax that it didn't pay. In states where similar legislation is not adopted, if distributions are made to shareholders and then loaned back to the corporation[38] the distribution will be taxed to the shareholders as a dividend and will not be deductible by the corporation in computing its taxable income.

(d) *The general arrangement of the Code*

The statutory scheme of Subchapter S is simple. Section 1371 defines a small business corporation. Section 1372 provides that such a corporation may elect not to be taxed as a corporation and sets forth rules pertaining to how and when the election is made and terminated, and the effect of such election upon the corporation and its shareholders. Section 1373 prescribes the methods by which the corporation's income is taxed to its shareholders. Section 1374 deals with net operating losses of the corporation. Special rules applicable to distributions by corporations are set forth in Section 1375. Section 1376 covers adjustment to

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as concerned actual distributions between the date of election and premature termination later in the year.

[36] Discussed at P. 276 infra.

[37] Discussed at P. 269 infra.

[38] See P. 286 infra.

basis of stock of, and indebtedness owing, shareholders, and Section 1377 contains provisions governing earnings and profits of electing small business corporations.

Eligibility Requirements For Election— Internal Revenue Code, Section 1371

Section 1371(a) defines a "small business corporation" and Section 1371(b) defines an "electing small business corporation." An electing small business corporation is simply a small business corporation that has made an election under 1372(a) which, under Section 1372, is in effect for such taxable year.

A small business corporation, curiously enough, is not restricted in size either as to dollar volume or as to number of employees.

A corner grocery store with one employee or a billion-dollar business with thousands of employees could qualify under Subchapter S.

In order to qualify under this subchapter, the corporation must be a domestic corporation[39] which is not a member of an affiliated group of corporations.[40] This denial of qualification to a subsidiary may tend to weaken the attempt to aid small business in some instances.[41]

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[39] For definition of domestic corporation, see Int. Rev. Code, Secs. 7701(a)(3) and (4), and Proposed Regulations Section 1.1371–1(b).

[40] As defined in Int. Rev. Code, Section 1504. A corporation which is a member of an affiliated group, that is, one or more chains of "includible" corporations, is ineligible to make an election. This does not mean that, in every case where there is a parent-subsidiary relationship, neither corporation can elect. Clearly the subsidiary cannot, because some of its stock will be owned by somebody other than an individual. But the parent may be eligible. If it has no subsidiaries and qualifies for the election and makes a valid election which is in effect, it can thereafter while the election is in effect acquire a wholly owned subsidiary without being disqualified, because, under Section 1504(b)(8), as amended by the 1958 Act, it is not an "includible" corporation and hence not a member of an "affiliated group" entitled to file a consolidated return. See proposed Regulations Sec. 1.1371–1(c).

Under Section 1371, the corporation must not have more than 10 shareholders. Where stock is held in joint tenancy, in a tenancy in common, tenancy by the entirety, or as community property, each person having an interest as owner or part owner is treated as a separate shareholder.[42]

Generally, persons for whom stock in a corporation is held by a nominee or agent will be considered shareholders of the corporation. However, if stock is owned by a trust which is subject to the provisions of Subchapter J of the Code or by a voting trust, the trust is considered the shareholder even though the dividends paid to the trust are includible directly in the income of the grantor or some other person.[43]

All shareholders must be citizens or resident individuals, or estates. This eliminates all corporations of which one or more shares are owned by a nonresident alien,[44] a corporation, a partnership or a trust.[45] Stock held in the name of a custodian or guardian does not disqualify. The Revenue Service has held that such ownership does not constitute a trust.[46] This is very important in view of the many Gifts to Minors statutes enacted by the States in recent years.

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[41] Under the Small Business Investment Act of 1958 (72 Stat. 689), which is a companion effort to aid small business, the investment company is authorized to purchase debentures of the small business, which are convertible into stock at the option of the investment company (Sec. 304(b)(3)). Since the exercise of this option would result in the operating company becoming a partly owned subsidiary of the investment company and thus ineligible for the election, small business may be forced to chose between the benefits of Subchapter S treatment and the benefits of financing through a small business investment company. This would be true even if the operating company and the investment company did not come within the technical definition of affiliated group contained in Section 1504, because some stock would be owned by an entity other than an individual or estate.

[42] See T.I.R. 113. The rules of constructive ownership apply here in reverse, as it were. For instance, under the rules of the Personal Holding Company Act or under Section 318 a father and mother and five children would count as one shareholder; here they would count as seven.

[43] Proposed Regulations 1.1371–1(d).

[44] There is no prohibition of estates of nonresident alien individuals.

While the administration of trusts might be rendered difficult in the event they were permitted to own stock in Subchapter S corporations and while their exclusion under Section 1371 may have been designed to prevent circumvention of the rules of eligibility,[47] yet the number of close corporations rendered ineligible by reason of shareholdings in the hands of family trusts must be considerable. There are in existence many trusts for minors created before the Gifts to Minors acts, and numberless other family trusts,[48] including marital trusts.[49]

This requirement that a small business corporation, to qualify as such, must not have a trust as a shareholder creates all kinds of problems upon the death of a shareholder. Not only must the other shareholders, if they want to preserve the election, make sure that the deceased's personal representative files a consent within 30 days of death,[50] which he may not be willing to do, but also, if he does consent, they must be familiar with the terms of the decedent's will so that they may know if there is any likelihood of any of the stock being transferred to a trust. If trusts are created by the will, do the shareholders have to wait on the executor's doorstep to try and persuade him to transfer the shares to a beneficiary who can consent?[51]

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[45] See Note 3.

[46] T.I.R. 113. See also Restatement, Trusts, § 7 (1935) and 1 Scott on Trusts.

[47] Such as the limitation to 10 stockholders.

[48] Apparently if A transfers stock of an electing corporation to a trust to pay the income to B for life and upon his death to convey it to C, neither the Trustee nor B can execute a consent and the election terminates. But if A creates a life estate in B with the remainder to C, there is no trust and the election is not terminated. See Note, 72 Harvard Law Review 710 (February 1959).

[49] Interesting questions may arise in connection with stock held by a trust, the grantor of which is treated under Sections 671 to 677 as the substantial owner thereof. If the Revenue Service has taken the position in the past that the trust will not be recognized for income tax purposes, and has subjected the grantor to income tax as if no trust were in existence, can it now turn around and, also for income tax purposes, claim that the trust does exist and as such is ineligible to consent, or can the grantor claim that the trust should be ignored and that he as substantial owner of the corpus can consent? For the moment the question seems to be settled; see Proposed Regulations § 1.1371-1(e).

There must be only one class of stock. While the statute itself is silent as to whether this refers to authorized or only to outstanding stock, the Proposed Regulations indicate that it refers only to issued and outstanding stock. Treasury stock and unissued stock of a different class than that held by the shareholders does not disqualify a corporation.[52]

Clearly, a corporation with both common and preferred outstanding would not qualify, nor would Class A voting common and Class B nonvoting common, even though all their other rights were the same.[53] But where there are Class A common and Class B common having exactly the same rights in all respects except that each class has the right to elect one-half of the directors, this does not disqualify the corporation.[54]

It has been suggested that one way to avoid the one class of stock requirement is to finance the corporation through the use of bonds. This raises an interesting question in connection with the Commissioner's power to vary the impact of taxability regardless of the form of the instruments involved.[55] There has been a long line of decisions involving so-called ''thin corporations.'' The question in such cases has been whether corporate securities issued by a corporation in the form of debt (often in amounts far in excess of the shares of stock) should be treated as stock because of inadequate capitalization.[56]

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[50] See P. 261 infra.

[51] Where the stock is to be transferred to a testamentary trust, the election can be continued during the period of the estate's holding, but it will terminate upon the actual transfer of the shares to the trust.

[52] Proposed Regulations § 1.1371–1(g).

[53] T.I.R. 113.

[54] Ibid.

If such evidence of indebtedness is treated as stock under the doctrine of ''thin capitalization,'' will it be deemed to constitute an extra class of stock for the purposes of Subchapter S? If so, a very serious additional hazard will have been placed in the way of those contemplating the incorporation of a business and an election under the subchapter.[57]

Election Requirements, Effects and Termination Internal Revenue Code, Section 1372

(a) *Election requirements and effects*

Section 1372(a) provides that a small business corporation may elect [58] not to be subject to the regular corporation income tax if all of the persons [59] who held stock in the corporation on the first day of the first taxable year for which the election is effective, or on the date of the election, if the election is made after such first day, consent to the election.[60]

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[55] Gregory v. Helvering 293 US 465; Commissioner v. Court Holding Co. 324 US 331 (1945); the doctrine of taxing the income of a trust to the grantor as the substantial owner thereof.

[56] The litigation usually arose out of corporate payments claimed to be deductible either as interest on indebtedness or return of capital.

[57] Note the significant language of Proposed Regulations § 1.1371–1(g): "If the outstanding shares of stock of the corporation (including stock which is improperly designated as a debt obligation) are not identical with respect to the rights and interest which they convey in the control, profits and assets of the corporation, then the corporation is considered to have more than one class of stock."

[58] The election is the act of the corporation, but all the shareholders must consent in writing in order for it to be valid.

[59] See P. 255 supra, for limitations on "persons."

If a person becomes a shareholder after the first day of the taxable year for which the election is effective or after the day on which the election is made (if such day is later than the first day of the taxable year) such person must file a written statement of his consent to the election within 30 days of the date he becomes a new shareholder.[61] If the new shareholder is an estate, the 30 day period shall not begin until the executor or administrator has been appointed, but in no event will such period begin later than 30 days following the close of the corporation's taxable year in which the estate became a shareholder.[62]

Section 1372(b)(1) provides that the effect of a valid election upon the corporation is to exempt it from income tax for any taxable year during which the election is in effect and to subject it to the special rules of Section 1377 relating to adjustments to earnings and profits.[63]

Section 1372(b)(2) provides that the effect of a valid election upon the shareholders is to subject them, during the year in which the election is in effect, to the provisions of Section 1373 (relating to the taxation of corporation undistributed taxable income to the shareholders),[64] Section

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[60] Thus, an election made prior to the beginning of the first taxable year must be perfected by the consent of any persons who are stockholders on the first day of such year who were not stockholders on the day of election, and an election made after the first day of the taxable year which it affects need not have the consent of persons who ceased to be shareholders between the first day of that year and the date of the election. Shareholder consents must be filed with the corporate election. To exercise its election a corporation must file Treasury Form 2553.

[61] The necessity for any such hard and fast rule is not apparent. The dangers and possible inequities of such a rule are obvious. Further study should be given to this problem.

[62] Proposed Regulations § 1.1372–3(b).

[63] See P. 291 infra.

[64] See P. 265 infra.

1374 (allowing as a deduction to shareholders the net operating loss of the corporation),[65] Section 1375 (containing special rules for distributions by electing corporations)[66] and Section 1376 (relating to adjustment of the basis of stock of, and indebtedness owing, shareholders).[67]

Section 1372(c) provides, generally, that the election with respect to any taxable year must be made during the first month of such taxable year or during the preceding month.[68] In the case of a new corporation whose taxable year begins after the first day of a particular month, the term "month" does not refer to the calendar month but means the period beginning on such day and ending on the corresponding day of the succeeding month.[69]

For taxable years beginning prior to the enactment of the Act, a corporation in order to be eligible to elect had to meet the required conditions for every day between the date of enactment and the date of election. As to taxable years beginning after the date of enactment, the requirements must be met for the year for which the election is made. Thus a corporation on a January 31st fiscal year which had preferred stock outstanding on September 2, 1958 could not have qualified for its taxable year ending January 31, 1959, even if it had rid itself of its preferred stock on October 1, 1958, but, if otherwise qualified, it could have made a valid election during January or February 1959 for its taxable year ending 1960. The question remains whether if it had rid itself of its preferred stock on February

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[65] See P. 270 infra.

[66] See P. 277 infra.

[67] See P. 290 infra.

[68] Special provisions are set forth in Section 1372(c)(2) for taxable years beginning before the date of the enactment of the Act. The time for filing the election for all corporations having a taxable year of 12 months beginning prior to the date of the enactment of the Act has already expired.

[69] Rev. Rul. 58–516. Thus, if a corporation's taxable year begins on March 10, the shareholders are required to make the election by April 10, not by March 31.

15, 1959 and exercised its election on February 27, 1959, the election would be valid for its taxable year ending January 31, 1960. The statute is silent on the point, but it is believed that it would be wise to see to it that a corporation is fully eligible by the day before its taxable year for which Subchapter S treatment is desired, even though it is not necessary to execute the election and obtain stockholder consent until as much as 30 days later.[70]

Section 1372(c) provides that an election shall be effective for the taxable year and all succeeding taxable years with respect to which it is not terminated.[71]

(b) *Termination of election*[72]

An election can be terminated in any one of the five ways described in Section 1372(e).

1. Failure of a new shareholder to consent.

If any person who was not a shareholder on the first day of the first taxable year for which the election is effective, or on the day on which the election is made (if such day is later than the first day of the taxable year), becomes a shareholder and does not consent within 30 days[73] of becoming such a shareholder, the election automatically terminates.[74]

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[70] Proposed Regulations § 1.1372–1(a) indicate that this is not necessary: "The qualifications . . . must be met as of the first day of the first taxable year . . . unless the election is made after such first day, in which case the qualifications need not exist prior to the date of the election."

[71] The election has a continuing effect and need not be renewed annually. But annual returns of information are required under Section 6037 which reads: "Every electing small business corporation (as defined in Section 1371(a)(2)) shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowable by subtitle A, the names and addresses of all persons owning stock in the corporation at any time during the taxable year, the amount of money and other property distributed by the corporation during the taxable year to each stockholder, the date of each such distribution, and such other information. . . ."

[72] For some of the dangers of automatic termination, see text P. 282 regarding the "locking-in" of undistributed taxable income.

[73] For the situation in case of an estate, see P. 257 supra.

2. Revocation.

An election may be terminated or revoked by the corporation for any taxable year subsequent to the first taxable year for which the election is effective. To be effective for the year in which it is made, it must be made within the first month of that year. If it is not made within the first month it will not become effective until the following year.[75] The consent of all persons who were shareholders at the beginning of the day of revocation is required.[76]

3. Ceasing to be a Small Business Corporation.

The election automatically terminates if at any time the corporation ceases to be a small business corporation. Thus it terminates if an eleventh person, a nonresident alien or a trust, partnership or corporation becomes a shareholder, or if another class of stock is issued.[77]

4. Foreign income.

The election terminates if for any taxable year the corporation has gross receipts, more than 80% of which are derived from sources outside the United States.

5. Personal holding company income.

The election terminates if for any taxable year the corporation has gross receipts[78] more than 20% of which is derived from royalties, rents,[79] dividends, interest,[80] annuities,[81] and sales or exchanges of stock or securities.

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[74] Proposed Regulations § 1.1372–4(b)(1). Thus stockholders can affect a valid revocation in the last month of the taxable year.

[75] Proposed Regulations § 1.1372–4(c). Voluntary revocation of the election is the only method of termination that is not retroactive.

[76] These consents must be attached to the statement of revocation that the corporation is required to file with the District Director.

[77] In the event of such a termination, the corporation is required to notify the District Director giving complete information as to the cause, etc. See Proposed Regulations § 1.1372–4(b)(3).

[78] Except in the case of sales of securities where gross receipts are

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taken into account only to the extent of the gains therefrom, the term "gross receipts" means the total amount received or accrued by the corporation under the method used by it in computing its taxable income. It includes the total amount received or accrued from the sale or exchange of any kind of property, from investments and for services rendered by the corporation. It does not include amounts received in nontaxable exchanges (except to the extent gain is recognized) nor amounts received as a loan, as a repayment of a loan, as a contribution to capital, or on the issuance by a corporation of its own stock. Three examples are given in the Proposed Regulations:

(1) A corporation on the accrual basis sells property and receives payment partly in money and partly in the form of a note payable at a future time. The amount of money and the face amount of the note would be considered gross receipts in the taxable year of the sale and would not be reduced by the adjusted basis of the property, the costs of sale, or any other amount.

(2) A corporation has a long term contract as defined in § 1.1451–3 with respect to which it reports income according to the percentage-of-completion method. The portion of the gross contract price which corresponds to the percentage of the entire contract which has been completed during the taxable year shall be included in gross receipts for such year.

(3) A corporation which regularly sells personal property on the installment plan elects to report its taxable income on the installment basis in accordance with Section 453. The installment payments actually received in a given taxable year of the corporation shall be included in gross receipts for such year.

[79] The term "rent" includes the amount received for the use of both real and personal property. Thus a corporation in the business of renting trucks would be ineligible. The proposed regulations exclude from the term "rents" payments for the use or occupancy of rooms or other space where significant services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels or motels. See Proposed Regulations: § 1.1372–4(b)(5)(iv).

[80] Interest includes tax-exempt interest, Proposed Regulations: § 1.1372–4(b)(5)(vi).

[81] The term "annuities" means the entire amount received as an annuity under an annuity, endowment, or life insurance contract, regardless of whether only part of such amount would be includible in gross income under Section 72. Proposed Regulations § 1.1372–4(b)(5)(vii). Query as to lump sum proceeds of life insurance.

The most significant difference between the definition of personal holding company income under Section 1372(e) and that under Section 543 is that there is no exception under Subchapter S for corporations whose rental income is 50% or more of gross income. Thus real estate investment corporations are disqualified, except, that in the year in which assets are sold, it may be possible to qualify.

The termination of an election under paragraphs (1), (3), (4) or (5) of Section 1372 is effective for the taxable year of the corporation in which occur the events causing the termination and for all succeeding taxable years. Termination under paragraph (2) of Section 1372 is only effective for the year following the voluntary revocation, except where it is made in the first month of the year.[82]

(c) *Election after termination*

Section 1372(f) provides that a corporation and any successor [83] to such corporation, which has once made an election under Section 1372(a) cannot again make such election for any taxable year prior to its fifth taxable year following the first taxable year for which the termination or revocation of the prior election is effective, unless consent to such new election is given by the Commissioner.

Considerable concern has been felt about this particular section of Subchapter S. Many of the problems likely to confront the shareholders of electing corporations can be expected to arise out of the automatic termination provisions.[84] Such automatic termination may have been something that the shareholders could not have anticipated and did not wish to happen. It may have placed them in a disadvantageous position taxwise. To prevent the corporation from reelecting for five years might produce some very harsh results and might destroy the very purpose of the legislation, in that people would hesitate to make use of Subchapter S for fear of unexpected and unwanted terminations which would leave them at the mercy of the Commissioner.

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[82] See Notes 74 and 75.

[83] Proposed Regulations § 1.1372–5(b) defines the term "successor corporation."

[84] See, for instance, P. 261 for requirements as to consent of a new shareholder and P. 257 in connection with estates and trusts.

The language of Section 1.1372–5 of the Proposed Regulations seems to set at least some of these fears at rest. The paragraph, while placing the burden upon the corporation to establish that the Commissioner should consent, continues, ". . . consent will ordinarily be denied unless it can be shown that the event causing the termination was not reasonably within the control of the corporation or shareholders having a substantial interest in the corporation and was not part of a plan to terminate the election in which plan such shareholders participated."[85]

Treatment of Corporation Taxable Income Internal Revenue Code, Section 1373

Section 1373 of the Internal Revenue Code provides the rules for the treatment of the income of an electing small business corporation.

None of the earnings of the corporation are taxed to it as an entity but are taxed instead to its stockholders in a somewhat similar way to that in which the earnings of a partnership are taxed to the partners.

Briefly the stockholders are taxed upon actual distributions of earnings to them and also on earnings that are not distributed to them—the so-called "undistributed taxable income."

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[85] Note the language in Proposed Regulations § 1.1372–5(a)—The fact that more than 50 per cent of the stock in the corporation is owned by persons who did not own any stock in the corporation during the first taxable year for which the termination is applicable will tend to establish that consent should be granted.

The taxable income of a Subchapter S corporation is the same as that of a non-electing corporation except that it must be adjusted by adding thereto:

1. The 85% deduction for dividends received from domestic and certain foreign corporations.
2. Net operating loss carrybacks and carryovers.
3. Partially exempt interest.
4. Dividends received deduction for dividends on certain public utility preferred stock.[86]

The "undistributed taxable income" is the corporation's taxable income (as above described) minus the amount of money distributed as dividends during the taxable year out of earnings and profits of the taxable year as specified in Section 316(a)(2) of the 1954 Code.[87]

The "undistributed taxable income" (as above described) is to be included in the gross income of the shareholders who were such on the last day of the taxable year of the corporation.[88] The amount includible in the gross income of each such shareholder is the amount which he would have received as a dividend, if, on the last day of the taxable year of the corporation, there had been distributed pro rata to the persons who were shareholders on that date an amount equal to the corporation's undistributed taxable income for its taxable year. The amount is taken into income by a shareholder in his taxable year in which or with which the taxable year of the corporation ends and is considered to have been received on the last day of the corporation's taxable year.[89] Illustrative examples are given in the Proposed Regulations.[90]

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[86] Int. Rev. Code, Sec. 1373(d).

[87] Int. Rev. Code, Sec. 1373(c).

[88] Compare the treatment of a shareholder's proportion of a net operating loss under Section 1374 where the share is apportioned on a day-to-day basis according to the length of time during the year that the taxpayer was a shareholder.

[89] Int. Rev. Code, Sec. 1373(b).

[90] Proposed Regulations, § 1.1373–1(g):

Example (1). An electing small business corporation has taxable

There has been a good deal of discussion among practitioners of the use of Subchapter S as a means of dividing up the income among the members of the family of the owner of the business, and to the extent that the arrangement is not subject to attack under Section 1375(c)[91] the subchapter does provide a very useful vehicle in this regard. But some suggestions have gone further and it has been conjectured that if the owner of a Subchapter S corporation had an outstandingly profitable year, he might on the last day of the year distribute stock to his children or others (not necessarily family) on the understanding that, later on (perhaps in a year when the corporation was doing badly), the donees would return the stock to him. That the Commissioner is well aware of this possibility is evidenced by the language of Proposed Regulations: "A donee or purchaser of stock in the corporation is not considered a

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income and current earnings and profits of $100,000 for its taxable year. During that year, it distributed $80,000 in money among its ten equal shareholders. The $8,000 received by each shareholder in that year is included in his gross income (for his taxable year in which it was received) as a dividend from current earnings and profits. The undistributed taxable income of the corporation for the taxable year is $20,000 ($100,000 minus $80,000 dividends in money). Since each shareholder would have received a dividend of $2,000 if the undistributed taxable income had been distributed pro rata, that amount must be included as a dividend in the gross income of each shareholder for his taxable year in which or with which the taxable year of the corporation ends.

Example (2). Assume the same facts as in example (1) except that the corporation has only $70,000 of taxable income. The difference between taxable income and current earnings and profits of $100,000 is attributable to the fact that certain deductions allowable in computing taxable income (such as percentage depletion in excess of cost depletion) do not decrease earnings and profits. The distributions of $80,000 during the taxable year are still included as dividends in the gross income of the shareholders since they are distributions out of earnings and profits. However, there is no amount to be included under Section 1373(b) since the corporation has no undistributed taxable income for the taxable year.

[91] See P. 280 infra.

shareholder unless such stock is acquired in a bona fide transaction and the donee or purchaser is the real owner of such stock. The circumstances, not only as of the time of the proposed transfer but also during the periods preceding and following it, will be taken into consideration in determining the bona fides of the transfer. Transactions between members of a family will be closely scrutinized.''[92]

The taxable portions of actual distributions and the ''undistributed taxable income'' are treated as ordinary income to the shareholders except that net long-term gains over net short-term capital losses retain their character in the hands of shareholders up to the amount of the corporation's taxable income.[93] The effect of passing through to the stockholders capital gains only to the extent of the corporation's taxable income is that ordinary corporate operating losses are offset against long-term capital gains as in a non-electing corporation. Thus an electing shareholder may not be able to offset the corporation's long-term capital gains against his own individual capital losses, nor the corporation's operating losses against his own individual ordinary losses, both of which courses would be available to a partner.

If a corporation is anticipating a substantial long-term gain, it might be well for it to elect under Subchapter S for one year only and then terminate the election for subsequent years. If the gain doesn't materialize the corporation can presumably see to it that the election is terminated retroactively.[94]

Capital losses are taken into account in determining accumulated earnings and profits but not in determining taxable income under Section 1373(d).[95] Nor does a capital loss (unlike an operating loss) pass through to the stockholders.

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[92] Proposed Regulations § 1.1373–1(a)(2).

[93] Int. Rev. Code, Sec. 1375(a).

[94] See p. 264 supra.

As previously stated, the income of an electing corporation, when passed through to the stockholders, loses its identity except in the case of capital gains. Tax-exempt interest is not part of the taxable income of the corporation under Section 1373(b), but it does increase the earnings and profits which, when distributed, will be taxable as a dividend.

One other aspect of the determination of undistributed taxable income and its effect on the shareholders is the matter of the distribution by the corporation to its shareholders of property in kind. Such distributions do not reduce undistributed taxable income.[96] This may have unforeseen and unsuspected effects on shareholders, and in some cases unpredictable results.[97]

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[95] See P. 292 infra and note 155.

[96] Proposed Regulations § 1.1373–1(g):

Example (3). An electing small business corporation has taxable income and earnings and profits of $10,000 for its taxable year. The corporation has no accumulated earnings and profits as of the beginning of its taxable year. During the taxable year it distributes property other than money with a basis of $10,000 and a fair market value of $20,000. The undistributed taxable income of the corporation is $10,000 since the property distribution does not reduce taxable income for purposes of that computation. However, the current earnings and profits are allocated ratably to the constructive distribution of undistributed taxable income and the distribution of property, taken into account at fair market value; that is, $3,333, to the constructive distribution and $6,667 to the distribution of property. Therefore, although undistributed taxable income is $10,000, only $3,333 would be treated as a dividend on a distribution of undistributed taxable income, and that is the amount the shareholders include pro rata in gross income pursuant to Section 1373(b). The distribution of property is a dividend only to the extent of $6,667.

Example (4). Assume the facts are the same as in example (3) except that the corporation has accumulated earnings and profits of $20,000 as of the beginning of the taxable year. The $20,000 accumulated earnings and profits at the beginning of the taxable year are sufficient to cover that portion of the distribution of property which is not out of current earnings and profits ($13,333) and that portion of the constructive distribution which is not out of current earnings and profits ($6,667). Therefore both distributions will be fully taxable as dividends.

Distributions in exchange for stock and distributions in complete liquidation do not change the amount of undistributed taxable income of the electing corporation reportable by the shareholders under Section 1373(b).[98]

Treatment of the Net Operating Loss of the Corporation—Internal Revenue Code, Section 1374

Internal Revenue Code, Section 1374 provides that the net operating loss of an electing small business corporation shall be allowed as a deduction from gross income of the shareholders of such corporation[99] under certain conditions and limitations.

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[97] See discussion pages 13 and 14 Monograph of the Practicing Law Institute entitled "Corporate Tax Election to Pass Income and Loss to Shareholders."

[98] Proposed Regulations § 1.1373–1(g):

Example (5). An electing small business corporation has taxable income and current earnings and profits of $100,000 for the taxable year. There are no accumulated earnings and profits as of the beginning of the taxable year. During the taxable year the corporation distributes $50,000 in a redemption that qualifies under Section 302(a). The undistributed taxable income of the corporation is $100,000. Since the current earnings and profits of $100,000 are first allocated to the constructive distribution of $100,000, that amount is includible in the gross income of the persons who were shareholders on the last day of the taxable year.

Example (6). Corporation X, of which A and B are each 50% shareholders, has been an electing small business corporation for several years. Shortly before its taxable year 1962, Corporation X adopts a plan of complete liquidation. During 1962 it has $3,000 of taxable income and earnings and profits. The only distributions made during 1962 are distributions in liquidation. The final distribution is made on October 15, 1962, after which Corporation X retains no assets and is no longer in existence for tax purposes. Corporation X has $3,000 of undistributed taxable income for its taxable year ended October 15, 1962, and A and B must each include $1,500 for his taxable year in which ends the taxable year of Corporation X.

[99] Int. Rev. Code § 1374(a)—"A net operating loss of an electing small

Thus as a general rule, if A and B are the sole stockholders of an electing small business company, and each owns 50% of the stock and the corporation for 1959 had a net operating loss of $10,000, A and B would each be entitled to a deduction of $5,000 from his other gross income.

This is called a "pass through" by the Senate Finance Committee.[100] It is in principle exactly the same process as passing the net income of an electing small business corporation through to its stockholders. The "pass through" of the income or loss of the corporation to its stockholders is the very essence of Subchapter S. Out of this principle arise all the conditions, limitations and complications with which we are concerned.

But while the principle of "pass through" is the same whether it is a passing on of profit or loss, there is an important difference in the treatment as to who receives the benefit of the profit or loss. As we have seen[101] corporate profits are allocated to those persons who are shareholders on the last day of the year and this is so even if one or more of such shareholders only acquired his stock on the last day of the year. In the case of corporate operating losses, however, these are allocated to stockholders in proportion to the length of time during the year that they were stockholders.

Each person who was a shareholder in an electing small business corporation at any time during the year in which the loss was sustained, is entitled to a deduction[102] for his taxable year in which or with which the taxable year of the

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business corporation for any taxable year shall be allowed as a deduction from gross income of the shareholders of such corporation in the manner and to the extent set forth in this section."

[100] See Note 3.

[101] Supra P. 266.

[102] Int. Rev. Code § 1374(b).

corporation ends[103] in the amount of his proportionate share of the corporation's loss. First the corporation's net operating loss is computed as provided in Section 172(c)[104] except that the deductions provided in Part VIII of Subchapter B, other than organizational expenditures, are not allowed.[105] This loss is then divided by the number of days in the corporation's taxable year so as to determine the daily net operating loss. This amount is apportioned "among the shareholders on a day-by-day basis in proportion to the number of shares held by each shareholder on each day of the year"[106] and these daily amounts are totalled for each stockholder.

The purpose of apportioning the loss on a daily basis is to prevent people from buying stock of an electing small business corporation with an accrued loss in order to offset their other income.

An important limitation upon the amount of the net operating loss that can be apportioned to a shareholder and taken by him as a deduction is that the shareholder's portion of the loss is limited to the adjusted basis of his investment in the corporation, whether his investment be in the form of stock or of bonds or other indebtedness. This adjusted basis is determined as of the close of the corporation's taxable year or as of the last day of such taxable year that the shareholder was a shareholder, if he was not a shareholder on the last day of the corporation's taxable year.[107]

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[103] Corporation X, an electing small business corporation, has a net operating loss for its taxable year ending December 31, 1960 of $1,000, A and B each owned 50% of the stock until July 1, 1960 when A sells his stock to C. A is entitled to a $500 deduction resulting from the corporation's operating loss for the calendar year 1960. If A is on a fiscal year ending November 30, the $500 item will be a deduction in his taxable year ending November 30, 1961. Proposed Regulations § 1.1374–4, Example (2). But note that a shareholder who dies before the end of the taxable year of the corporation is not entitled to a loss, since the corporation's taxable year did not end in or with the shareholder's year—See Proposed Regulations § 1, 1374–1(b)(2).

[104] Int. Rev. Code, Sec. 172(c).

[105] Int. Rev. Code, Sec. 1374(c)(1).

[106] See Note 3.

Practitioners should beware of this limitation. Any amount disallowed under Section 1374 is forever lost. Low basis stock may result in nobody obtaining the advantage of the net operating loss. The shareholders cannot deduct the loss to the extent that it is in excess of the adjusted basis of their stock and a corporation, having made the election, cannot carry it back to a pre-election year or forward to a subsequent year. The report of the Senate Finance Committee[108] makes this clear, saying at page 220:

> "Since the net operating loss of the electing small-business corporation is allowed as a deduction directly to the shareholders, Section 172 is amended to provide that, in determining the net operating loss of any corporation, there shall be disregarded the net operating loss of such corporation for any taxable year for which the corporation was an electing small business corporation."[109]

It will be observed that the reason for the disallowance to the corporation is the allowance to the shareholder. No provision is made for the case where there is no allowance to the shareholder, and it is difficult to see how there could be, since the loss might be allowed to some shareholders and not to others depending upon the basis of their stock.

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[107] Int. Rev. Code, Sec. 1374(c)(2).

[108] See Note 3.

[109] Int. Rev. Code, Sec. 172(h) provides: "In determining the amount of the net operating loss deduction under Subsection (a) of any corporation, there shall be disregarded the net operating loss of such corporation for any taxable year for which such corporation is an electing small business corporation under Subchapter S." A corresponding provision is found in Section 1373(d)(1).

One of the most frequently quoted reasons for forming a Subchapter S corporation to conduct a new business is that if, as often happens during the first few years, the business shows losses, they can be offset against the shareholders' other income. It is thus possible, it is said, to gain the advantage of limited liability and still be able to set off the corporate losses against other income just as it is possible to do so when operating as a partnership or proprietorship.

Presumably, if A put money and property of the value of $50,000 into a corporation in return for stock of $30,000 and indebtedness of $20,000, and filed an election under Subchapter S,[110] he would be able to set off corporate losses in the first year of up to $50,000 against his income from other sources. But supposing he put in $20,000 in cash and had his corporation buy $50,000 worth of assets from a third party for cash and notes? It would appear that he would be limited to a deduction of $20,000 of the corporate operating loss, since the basis of his stock would be $20,000 and the indebtedness of the corporation of $30,000 is not "indebtedness to the shareholder."

It has been suggested that where shareholders are likely to lose the benefit of a deduction for a net operating loss of an electing corporation because in excess of the basis of their stock, they should, prior to the end of the year, either make an additional contribution to the capital of the corporation or increase the corporate indebtedness to themselves.[111] Under certain circumstances, it may even be advisable for the stockholder to borrow from outside sources and lend the funds to the corporation.[112]

The adjusted basis of stock and indebtedness for the purpose of determining the limitation under Section 1374 is not affected by adjustments to basis required by Section 1376. This means that if the basis of a shareholder's stock is increased by reason of undistributed earnings under Section 1373(b), he is left in the same position as far as concerns his ability to deduct his share of the corporation's net operating loss in a given year as he was before the increase.[113]

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[110] Assuming that the indebtedness is not disguised stock. See Note 57.

[111] Mestern—Electing corporation will have accounting problems, 10 Journal of Taxation 131 (March 1959).

[112] Hoffman, 37 Taxes 21 (January 1959).

The net operating loss deduction allowed to shareholders is not carried back to years beginning prior to January 1, 1958.[114] It may, however, be carried forward or backward to any year other than a year beginning prior to January 1, 1958. For the purpose of determining the amount of the operating loss which may be carried to such years, the loss is not diminished by income for years beginning before January 1, 1958, except to the extent that it was allowed to offset the income of those years.[115]

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[113] For example, if a sole shareholder's basis is $5,000 and in the first year the corporation earns $10,000 and in second year loses $10,000, he is limited to a deduction of $5,000 for the second year, even though the adjusted basis of his stock for purposes other than the limitation of Section 1374(c) may be $15,000. (IRC Sec. 1376(a)). Likewise, if basis is $5,000 and corporation has loss of $3,000 in first year, shareholder is not limited by Section 1374(c) to a deduction of only $2,000 in the second year. If the corporation has an operating loss of $5,000 in the second year, the shareholder would be entitled to a deduction of that amount. (IRC Sec. 1376(b)).

[114] Int. Rev. Code, Sec. 1374(d)(2).

[115] The operation of Section 1374(d) may be illustrated as follows: B is entitled under Section 1374 to a deduction in his taxable year 1958 of $6,000 resulting from the net operating loss of an electing small business corporation. During 1958 he has a net operating loss, computed without regard to such $6,000 deduction, of $20,000. In each of his taxable years 1955, 1956 and 1957 he had taxable income of $9,000. In each of his taxable years 1959 and 1960 he had taxable income of $3,000. Under Section 1374(d)(2) the net operating loss carryback from 1958 to 1955, 1956 and 1957 does not include the $6,000 deduction resulting from the loss of the small business corporation, so that $7,000 of taxable income remains in the year 1957 after the carry-back. For purposes of carrying the 1958 net operating loss forward to 1959 and 1960, the $6,000

In determining whether a corporation that has been in existence for some years should elect under Subchapter S, where it is apparent that such corporation is possessed of both gain-producing and loss-producing elements, the possibility of dividing the corporation into two separate corporations, the anticipated loss corporation electing under Subchapter S, should not be overlooked. If such a division can be made "tax free,"[116] it may be very advantageous to a high bracket taxpayer who can take the net operating losses of the Subchapter S corporation against his personal income, while causing the other corporation to accumulate earnings in anticipation of subsequent sale or exchange of its stock as a capital gain.[117]

In any case where a corporation has loss carryovers from years prior to the year of possible election, a decision on whether or not to elect may be a difficult one. If the corporation does not elect and if it continues to have losses it increases its loss carryover which may ultimately expire without being used. If it does elect and then the corporation has profits, such profits will be taxable to the shareholders without benefit of the loss carryover. By the time the election is terminated, the loss carryovers may have been lost entirely through lapse of time, since, in applying Section 172(b)(1) and (2) to a net operating loss sustained in a taxable year in which the corporation was not an electing small business corporation, a taxable year in which the corporation was an electing corporation is counted as a taxable year to which such net operating loss is carried

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amount is included in the net operating loss, and is not reduced by taxable income of years prior to 1958, so that the taxable income for the taxable years 1959 and 1960 is reduced to zero by the carryover. Proposed Regulations § 1.1374–4, Example (3).

[116] Int. Rev. Code, Sec. 355.

[117] See Note 72 Harvard Law Review 710 (February 1959). It is possible, however, as pointed out in the note, that the Commissioner might be able to reallocate the income of the two corporations under Section 482.

back or over.[118] Some writers have thought that the loss carryover would have to be reduced by profits earned during the election years. However, the Proposed Regulations indicate that the taxable income during the election years will be treated as zero for the purpose of computing the balance of the loss available to the corporation as a carryback or carryover.

Another factor to be taken into consideration in determining whether or not to elect where a corporation has paid corporate taxes in the previous two years, is the possibility that the deduction for the net operating loss will render valueless the non-business deductions available to low bracket stockholders.[120]

Special Rules Applicable to Distributions Internal Revenue Code, Section 1375

(a) *In general*

Section 1375 provides special rules as to treatment of capital gains by the shareholders, disallowance of dividends received credit and exclusion, allocation of dividends among family groups and the distribution of "undistributed taxable income" which has been previously taxed to shareholders.

(b) *Capital gain pass through*

Shareholders are permitted to report as long term capital gain that portion of any amount includible in their gross income as dividends out of current earnings and profits, including amounts treated as dividends under Section 1373(b), which represents their pro rata share of the corporation's excess of net long term capital gain over net short term capital loss,[121] provided such amount does not exceed their pro rata share of the taxable income of the corporation for that year.[122] This limitation, while necessary, sometimes has, as we have seen,[123] a disadvantageous effect on shareholders.

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[118] Hoffman, 37 Taxes 21 (January 1959). But compare Regs. Sec. 1.518–2(c) in connection with net operating losses of mutual savings banks when they first become subject to federal income taxes. This regulation says in effect that for the purpose of computing the net operating loss deduction, this deduction shall not be reduced by the income of any year during which the corporation was exempt from tax.

[119] Proposed Regulations § 1.1374–1(a).

[120] The deduction allowed by Section 1374 is considered as a deduction attributable to a trade or business and thus is allowable in computing adjusted gross income.

It should be observed in passing that capital loss carry overs from prior years during an election period will be applied first against the capital gain of the current year before determining the amount distributable to shareholders. Corporate net capital losses during election years are not, unlike operating losses,[124] passed through to shareholders. This has the effect of reducing the amount which shareholders can withdraw at capital gains rates.

To illustrate, assume current earnings and profits amounting to $120,000 consist of $80,000 capital gains and $40,000 other taxable income; a capital loss carryover of $60,000. The capital loss is set off against the gain leaving $20,000, plus other income of $40,000 equals $60,000, less actual dividends of $40,000 leaves constructive dividends of $20,000. Only $20,000 of the actual and constructive dividends (totalling $60,000) is taxable as long term capital gain in the hands of the shareholders.[125]

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[121] See Proposed Regulations § 1.1375–1(e), Ex. 1. An electing small business corporation, which has three equal shareholders has net long-term capital gain in excess of net short-term capital loss of $9,000 for its taxable year 1959. In that year it has taxable income and current earnings and profits in excess of $9,000, but makes no distributions. Of the undistributed taxable income includible in the gross income of each of the three shareholders pursuant to Section 1373(b) as dividends deemed received, $3,000 is treated as long-term capital gain.

[122] Int. Rev. Code, Sec. 1375(a). For example, if a corporation has net long-term capital gain in excess of its net short-term capital loss in the amount of $100,000 and taxable income and current earnings and profits each of $80,000, it cannot, by distributing $100,000 during the year, pass down to its shareholders $20,000 of accumulated earnings and profits at capital gain rates. See Proposed Regulations § 1.1375–1(e), Example (2).

[123] Supra P. 268.

[124] Supra P. 271.

Where there are distributions by a corporation involving more than one taxable year of the shareholders, the capital gains element in such distributions will be allocated proportionately. In other words, the capital gain rule cannot be applied so as to cause all the capital gain allocable to that shareholder to be included in one of his two taxable years.[126]

(c) *Internal Revenue Code Sections 34, 37 and 116*

Since, under the theory of Subchapter S, income earned by a corporation is taxed directly to its shareholders, Internal Revenue Code Sections 34 (dividends received credit), 37 (retirement income credit) and 116 (partial dividend exclusion) are inapplicable to amounts distributed by or constructively received from a Subchapter S corporation, to the extent that such amounts are distributions out of the earnings and profits of the taxable year.[127] For the purposes of Section 1375(b) earnings and profits of the taxable year are deemed not to exceed the corporation's taxable income.[128]

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[125] Supra P. 268.

[126] Note 3.

[127] Int. Rev. Code, Sec. 1375(b).

[128] See examples in Proposed Regulations § 1.1375–2(b):

Example 1. An electing small business corporation has taxable income and earnings and profits of $10,000 for the taxable year and accumulated earnings and profits of $20,000 at the beginning of the taxable year. During the taxable year the corporation distributes a dividend of $15,000 in money. Of the amount distributed, $10,000 is not entitled to the dividends received exclusion under Section 116 or the credits under Section 34 or 37, since it is paid out of the earnings and profits of the corporation's taxable year. The $5,000 paid out of accumulated earnings and profits is considered a dividend for the purposes of the exclusion and credits.

Example 2. Assume same facts as in example 1, except that the taxable

(d) *Reallocation among members of family groups*

One of the advantages of Subchapter S is that it permits division of corporate profits among its stockholders without the imposition of a double tax. A not infrequent situation in a small business has been where there were two stockholders, one of whom puts up all the money and the other of whom performs all the services. It was difficult if not impossible to reward the former without becoming involved in dividends. Provided the two stockholders are not within the family group this can now be avoided by having the corporation elect under Subchapter S.[129]

Section 1375(c) [130] is designed to prevent the avoidance of Federal income tax by the device of dividing up the stock of a Subchapter S corporation among the real owner's family. The Section gives the Secretary the power to reallocate the income as between the various family members [131] in order to reflect the value of services rendered, in much the same way as he has the power to reallocate the income of family partnerships. Where, then, a father is

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income for the taxable year is $10,000 and the corporation also received $1,000 of tax exempt interest on certain governmental obligations. Of the $15,000 distributed, only $9,000 would not be considered a dividend for purposes of the dividends received exclusion under Section 116 or the credits under Section 34 or 37, since, for the purposes of Section 1375(b), the earnings and profits for the taxable year are deemed not to exceed taxable income (as defined in Section 1373(d)).

[129] Kahn, 10 Journal of Taxation 130 (March 1959).

[130] Int. Rev. Code, Sec. 1375(c) Treatment of Family Groups.—Any dividend received by a shareholder from an electing small business corporation (including any amount treated as a dividend under Section 1373(b)) may be apportioned or allocated by the Secretary or his delegate between or among shareholders of such corporation who are members of such shareholder's family (as defined in Section 704(e)(3)) if he determined that such apportionment or allocation is necessary in order to reflect the value of services rendered to the corporation by such shareholders.

[131] For purposes of this section, the family of an individual includes only his spouse, ancestors and lineal descendants. Proposed Regulations § 1.1375-3(b).

performing substantially all of the services but the stock is divided equally between himself and his three minor children, each shareholder owning 25% of the stock, it would seem obvious that the father would have to be paid a reasonable salary and only the balance after the salary payment divided equally and taxed to the shareholders.

The question of what is a reasonable salary may become very troublesome in an electing small-business corporation, both as to salaries of present stockholder employees and as to salary continuation arrangements to the families of deceased employees.

It has been suggested[132] that, if an electing corporation has three equal stockholders, earns $100,000 and pays one of them a $40,000 salary, each stockholder would report $20,000 as his share of the undistributed taxable income and the salaried shareholder would report $40,000 in addition. Supposing, however, $15,000 of the salary was disallowed as unreasonable; that would increase the undistributed taxable income to $75,000 and each stockholder would have to report $25,000 and the salaried stockholder $40,000 in addition. Two shareholders, therefore, would report $25,000 when they had received only $20,000 and the salaried stockholder would report $65,000 when he had received only $60,000.

This situation should be compared with the reverse situation where a salary is deemed inadequate instead of excessive. The Proposed Regulations[133] now provide that the taxable income of the corporation shall be neither increased nor decreased because of the reallocation of dividends under Section 1375(c) and that the amount reallocated shall be considered a dividend to the shareholder to whom it is reallocated.[134]

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[132] P.L.I. Monograph P. 33, see Note 97.

[133] Proposed Regulations § 1.1375–3(a).

[134] Proposed Regulations § 1.1375–3(c) gives this example: The stock of an electing small business corporation is owned 50% by F and

(e) *Distributions of previously taxed income and the problem of the "locking in" of undistributed taxable income*

Internal Revenue Code, Section 1375(d) provides generally that where undistributed income of the corporation which has previously been taxed to a shareholder under Section 1373, is distributed to him by the corporation while the election is still in effect, his "net share of undistributed taxable income" for prior years is not again subject to tax but is treated as a return of capital and simply reduces the basis of his stock.

Section 1375(d)(2) defines a shareholder's net share of previously taxed undistributed taxable income as the sum of the amounts included in the gross income of the shareholder under Section 1373(b) for all prior [135] taxable years (during which the election was in effect), less the amounts allowable under Section 1374(b) [136] as a deduction from

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50% by S, a minor son of F. For the taxable year the corporation has $70,000 of taxable income and earnings and profits. During the year the corporation distributes dividends (including amounts treated as dividends under Section 1373(b) of $35,000 to F and $35,000 to S. Compensation of $10,000 is paid by the corporation to F for services rendered during the year, and no compensation is paid to S, who rendered no services. Based on the relevant facts, a reasonable compensation for the services rendered by F would be $30,000. In the discretion of the District Director, up to $10,000 of the $35,000 dividend received by S may, for tax purposes, be allocated to F.

[135] Thus if Corporation Y has $50,000 of undistributed taxable income for its fiscal year ending January 31, 1960, all of which is included in sole stockholder C's (calendar year) income, the amount so included does not increase C's net share of previously taxed income for purposes of distributions at any time during 1960, since his net share of previously taxed income is increased only by amounts included in gross income for his taxable years ending before the distribution. Proposed Regulations § 1.1375-4(g), Ex. (2).

[136] Sen. Fin. Committee Rep. No. 1983, 85 Cong. 2nd Sess. at P. 224 gives the following illustration of the operation of Section 1375(d): Corporation X, of which B is the sole stockholder at all material times, is an electing small-business corporation for its taxable years ending

gross income of the shareholder for all prior taxable years and the amounts previously distributed during the taxable year and all prior taxable years to the shareholder which, under Section 1375(d)(1), were not considered dividends.[137]

December 31, 1958, 1959 and 1960. For its taxable year 1958 it has a net operating loss of $10,000. For its taxable year 1959 it has an undistributed taxable income of $50,000. Assuming that B properly included in his gross income the undistributed taxable income of the corporation for the taxable year 1959 and assuming that the 1958 net operating loss did not exceed the limitation imposed by Section 1374(c)(2), B's net share of the corporation's undistributed taxable income as of December 31, 1959 is $40,000. On January 1, 1960, in accordance with regulations, the corporation makes a distribution to B of $20,000 of his share of the corporation's undistributed taxable income. For 1960, X Corporation has a net operating loss of $40,000. This loss, although it may be fully utilized by B as a deduction for his taxable year 1960 does not alter the value of the distribution made on January 1, 1960. The $20,000 distribution is a distribution which is not considered a dividend. However, in computing his net share of previously taxed income for years subsequent to 1960 he must take the $40,000 deduction into account.

[137] See Example (3) in Proposed Regulations § 1.1375–4(g): Corporation Z has two equal shareholders, A and B (both an calendar years) during its taxable year ended December 31, 1960. As of the beginning of 1960 Z has $20,000 of accumulated earnings and profits and for the taxable year 1960 it has current earnings and profits and taxable income of $8,000. In June 1960 it makes money distributions of $5,000 to A and $5,000 to B. In November 1960 it distributes the same amount in money to each. Immediately before the distribution in June, A's net share of previously taxed income was $6,000 and B's net share was $4,000. Current earnings and profits are allocated ratably to each of the four distributions. Therefore, each distribution to A and B is a dividend from current earnings and profits to the extent of $2,000. As to the June distribution, the $3,000 distributed to A and B which is not out of current earnings and profits is a distribution of previously taxed income and therefore not a dividend, since immediately before the distribution the net share of each is in excess of $3,000. As to the November distribution, the $3,000 distributed to A, which is not out of current earnings and profits, is a nondividend distribution, since his net share of previously taxed income at that date is $3,000 ($6,000 less $3,000 absorbed by the June distribution); however the $3,000 distribution to B, which is not out of current earnings and profits, is a nondividend distribution to the extent of $1,000,

The Proposed Regulations say[138] that a distribution of property other than money is never a distribution of previously taxed income[139] and it does not reduce the earnings and profits of the corporation.

If the election has been terminated voluntarily or involuntarily, no distribution of previously taxed income will be given nondividend treatment. It will be treated as a fully taxable dividend to the extent that the corporation has earnings and profits.

This is an ever-present danger in a Subchapter S corporation where an involuntary termination of the election may so easily happen. Of course, if a voluntary termination is foreseen, it is well to see that all income taxed to shareholders is actually distributed to them in the year before the termination becomes effective.

The nondividend treatment provided in Section 1375(d) applies only to "an electing small business corporation" which is defined in Section 1371(b) as a corporation which has made an election which is in effect for the taxable year. If the election is terminated during the year a distribution is made, even on the last day of the year, the election "is not in effect for such taxable year" and therefore distributions made during such year will be treated as taxable

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and a dividend from accumulated earnings and profits to the extent of $2,000, since his net share of previously taxed income at that date is only $1,000 ($4,000 less the $3,000 absorbed by the June distribution).

[138] Proposed Regulations § 1.1375-4(b).

[139] See Ex. (4), Proposed Regulations § 1.1375-4(g). Corporation N has current earnings and profits and taxable income of $30,000 for 1960. As of the beginning of that taxable year it has $20,000 of accumulated earnings and profits. During the year N distributes $28,000 in money and also property worth $10,000.

The entire $28,000 of money is a dividend out of current earnings and profits because current earnings and profits are applied first to the distributions of money. The property distribution is a dividend to the full extent of its value ($10,000), partly from current earnings and partly from accumulated earnings and profits, because a distribution of previously taxed income cannot be made in property other than money.

dividends.[140] Thus the importance of distribution in the year prior to the year of termination can readily be appreciated.

The concept of ordinary dividend treatment if the election is "not in effect for such taxable year," greatly reduces the attraction of a new corporation electing under Subchapter S with the thought that, if anticipated losses turn into profits during the first year, the election may be terminated just prior to the close of the year by creating one of the circumstances that would automatically terminate the election for that year.[141] The corporation in such a situation would be taxed in the ordinary way on its profits, any distributions made to shareholders would be taxed as dividends and undistributed profits would be frozen into the accumulated earnings and profits of the corporation.

Even if there is no termination of the election, a distribution of undistributed taxable income for a prior year will be taxable in part as a dividend if losses occurred in a year between the year undistributed income was earned and the year of actual distribution. This is so because the losses must be offset against the undistributed earnings of prior years. In other words, if a corporation had undistributed income in its first year of $1,000 and losses in its second year of $500, a withdrawal of $1,000 in its third year will result in $500 of the withdrawal being taxed as a dividend, to the extent of accumulated or current earnings and profits, even though the shareholder has already paid a tax on the $1,000 earned in the first year and could have withdrawn it that year.

A further caveat should be given where there is a change in stock ownership. The tax free withdrawal of undistributed income of prior years is only available to persons who were stockholders when the income was earned.[142] Thus a buyer or donee or even the shareholder's estate will not qualify for this special treatment.[143]

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[140] 10 Journal of Taxation 133 (March 1959); Proposed Regulations § 1.1375–4(a).

[141] Int. Rev. Code, Sec. 1372(e).

It can conclusively be said therefore that not to withdraw income in the year in which it is earned may in many instances, whether the election under Subchapter S is terminated or not, lead to a situation where that income can only be withdrawn by the shareholders at the price of a double tax. Thus the advantage that a Subchapter S corporation may, at first blush, seem to have over a family partnership, insofar as having more working capital available by not distributing income to shareholders, may be largely illusory.

In order to avoid the trap of "locked-in" income and at the same time maintain the working capital position of the corporation it may be advisable for the shareholders to withdraw the earnings and then loan them back to the corporation. It is possible, however, that the distribution occurring in the same year as the corporation notes given in connection with such a transaction might be deemed a distribution in kind and hence not qualified under Subchapter S, so that the stockholders would be taxed on both the fair market value of the distribution as a dividend and also on their shares of undistributed taxable income.

(f) *Subchapter S and the collapsible corporation*

There is some question as to whether an electing small business corporation can be used to avoid collapsible corporation problems. Under the provisions of Internal Revenue Code, Section 341, as amended, a shareholder's gain on the sale of his stock is treated as ordinary income, if the corporation is a ''collapsible'' corporation.

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[142] Proposed Regulations § 1.1375-4(g) Example (1)(iii).

[143] See Proposed Regulations § 1.1375-4(e)—A shareholder's right to nondividend distributions is personal and cannot in any manner be transferred to another. If a shareholder transfers part but not all of his stock in an electing small business corporation his net share of previously taxed income is not reduced by reason of the transfer and the transferee does not acquire any part of such net share. If a shareholder transfers all of his stock, any right which he may have had to nondividend treatment upon the receipt of distributions lapses entirely unless he again becomes a shareholder in the corporation while it is subject to the same election.

The amendment of Section 341 provides, in effect, that the tax treatment of the gain will depend upon the nature of the gain that would be realized by the selling shareholder were he to sell the corporate property himself. But under Subchapter S apparently the character of the proceeds as ordinary income or capital gain is determined solely with reference to the nature of the property in the hands of the corporation. Thus if a Subchapter S corporation sells a capital asset at a gain, it will pay no tax itself and the gain will be passed through to the shareholders as a capital gain. Since such a gain increases the basis of their stock by the amount of the gain, there is likely to be no further tax to them when the corporation distributes the cash.

Thus there is nothing in the Code that would prevent a real estate dealer from forming a Subchapter S corporation (assuming it could qualify under Section 1372(e)(5)) and having the corporation purchase real estate, rent it for a few months and then sell it.[144] Whether the Internal Revenue Service will permit tax avoidance in this manner is doubtful. An indication of the position the Commissioner may take is seen in the language of the Proposed Regulations at Section 1.1372–1(c): ''(8) Section 341, relating to collapsible corporations, may apply to gain on the sale or exchange of, or a distribution which is in exchange for, stock in an electing small business corporation.''

In any event Subchapter S is only a partial solution of the collapsible corporation problem because a corporation, more than 20% of the gross receipts of which consists of rents,[145] cannot qualify. It may, however, be able to do so in the event that a material part of its realty is sold, since the entire gross receipts from the sale will be taken into account. Timing the sale for the early part of the year should insure that the rentals are low enough in relation to the sale price for the corporation to qualify.

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[144] P.L.I. Monograph P. 26, see Note 97.

[145] Int. Rev. Code, Sec. 1372(e)(5).

(g) *Subchapter S and certain complete liquidations*

Internal Revenue Code, Section 337 is designed to prevent a tax being imposed on a corporation as a result of a sale by it of its assets provided the sale is pursuant to a plan of liquidation and provided all of the assets (except those needed to meet the claims of creditors) are distributed in complete liquidation within 12 months of the date of the adoption of the plan.

This was a relief provision designed to prevent a double tax as in *Comm. v. Court Holding Co.* 324 US 331 (1945).

If the asset sold by the corporation is only one of its assets and there are other appreciated assets, the use of Section 337 will result in a tax being imposed on the appreciation of those other assets, since that section requires the complete liquidation of the corporation. Under Subchapter S the gain on the asset sold can be passed through to the stockholders with only one tax—at the stockholder level—and the corporation does not have to be liquidated and will continue in business, so that no tax will be imposed on the appreciation in value of the unsold assets.

Section 337 requires a plan to be in existence prior to the sale, whereas an election may take place after the sale and still be effective as to such sale, as for instance, if the sale takes place right after the first of the year and the election is adopted later in the first month of the year.

The situation where a corporation has operating losses in the earlier part of the year with a sale at a substantial profit towards the end of the year presents some interesting possibilities.

If the corporation is an "electing" one, the operating losses will be set off against the gains before determining the amount taxable to shareholders, which may be much less profitable than having the operating loss carried back and set off against prior operating ordinary gains. Under Section 337 this can be done and yet the gain will be taxable at the stockholder level.

If it were desirable to pass the operating losses through to the shareholders instead of using them as a carryback and at the same time avoid recognition to the corporation of the gain on the sale, it would be advisable to use both Section 337 and Subchapter S. The gain on the sale would not be recognized to the corporation if it had adopted a plan of liquidation under Section 337 and hence would not become part of the undistributed taxable income for the year. Thus the operating losses would be passed through to the stockholders intact without any offsetting gains, and, upon the liquidation of the corporation during the next year, (and within the next 12 months), the stockholders would pick up the long term gain on the sale under Section 331.

(h) *Subchapter S and partial liquidations*

Suppose there is a corporation that has several business activities, possibly in different localities, and suppose further that all of these lines of business have been operated for less than five years.[146] A sale by the corporation of one of its businesses and payment of the proceeds in cash to its stockholders will be likely to result in a capital gains tax to the corporation and in ordinary income to the stockholders if there are accumulated earnings and profits (taking into account the sale itself), because of failure to qualify the transaction under Section 346. Even if qualification under Section 346 is possible there will, in the absence of election under Subchapter S, be two capital gains taxes. Subchapter S permits a corporation to sell part of its assets and pay over the gain in cash to its stockholders with only one tax, at the stockholder level—at capital gains rates.[147]

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[146] See Int. Rev. Code, Sec. 346(b).

Adjustments to Basis of Stock and Indebtedness Internal Revenue Code, Section 1376

(a) *Increase in basis*

Section 1376 requires adjustments to the basis of, and indebtedness owing to, shareholders of an electing small business corporation.

Subsection (a) provides that, to the extent that a shareholder is required to—and in fact does—report, as part of his gross income, amounts includible by virtue of Section 1373(b), the basis of such shareholder's stock is increased.

The effect of this rule is the same as if the undistributed taxable income had actually been distributed on the last day of the corporation's year and then been reinvested by the shareholder.[148] The increase in basis is effective as of such last day and survives a termination of the corporation's election.[149]

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[147] Note that under Subchapter S the electing corporation can pay out only the gain on the sale, whereas under Section 346 it could pay out the entire proceeds. This, however, may not make much difference if the basis of the corporate asset is low or the liabilities on the property are nearly equal to the basis; e.g., sale price of asset $10,000, basis $7,500, encumbrance $7,000. Net received by corporation will be $3,000 of which $2,500 can be distributed to the shareholders of the electing corporation.

[148] Because of the method of taxing undistributed taxable income under Section 1373(b), the increase in basis will affect only those shares of stock which the shareholder owned at the end of the corporation's year and is apportioned in equal amounts to each such share. See Proposed Regulations § 1.1376–1.

[149] Internal Revenue Code, Sec. 1372(b)(2).

(b) *Reduction in basis*

Section 1376(b) provides for the reduction (but not below zero) of the basis of a shareholder's stock by an amount equal to the amount of his portion of the corporation's net operating loss for any taxable year attributable to such stock.[150] The basis of any indebtedness of such a corporation to its shareholders is also reduced (but not below zero) by such amount, but only to the extent that such amount exceeds the basis of the shareholder's stock.[151]

The reduction in the basis of stock or indebtedness is effective as of the close of the corporation's taxable year in which the net operating loss was incurred as to stock which is held at such time and as of the close of the day before disposition if the stock was disposed of prior to that time.[152]

Adjustments to Earnings and Profits
Internal Revenue Code, Section 1377

(a) *Reduction for undistributed taxable income*

Section 1377(a) provides that the accumulated earnings and profits shall be reduced as of the close of the corporation's taxable year by the amount of the undistributed taxable income for such year required to be included in the gross income of the shareholders under Section 1373(b).[153]

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[150] According to the Proposed Regulations, this is done on an individual share basis. § 1.1376–2(2) reads: "The amount of the reduction in the basis of each share of stock shall be that portion of the shareholder's pro rata share of the corporation's net operating loss which is attributable to each such share under the rule in Section 1374(c). In the event that the basis reduction applicable to a share of stock under the rule in the preceding sentence exceeds the basis of such share, the excess shall be applied in reduction of the basis of all other shares of stock owned by the same shareholder in proportion to the basis of such shares remaining after the application of the rule in the preceding paragraph." An illustration of this application of a shareholder's share of the net operating loss as applied to three shares of stock with differing basis is set forth.

[151] Thus, the amount of the portion of the net operating loss attributable to the shareholder's stock is first applied in reduction of the basis of his stock and only the remainder, if any, reduces the basis of the indebtedness. Proposed Regulations § 1.1376–2(b)(1).

[152] Proposed Regulations § 1.1376–2(a)(3) and (b)(4).

This is necessary so as to avoid double taxation of the income of a Subchapter S corporation which does not distribute all of its income currently.

(b) *Current earnings and profits not reduced by any amount not allowable as a deduction*

Section 1377(b) provides that the current year's earnings and profits (but not its accumulated earnings and profits) shall not be reduced by any amount which is not allowable as a deduction in computing the taxable income of the corporation for the year.[154]

Illustrative examples are set forth in the Proposed Regulations.[155]

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[153] Thus an electing small business corporation which had accumulated earnings and profits of $100,000 on January 1, 1959 and undistributed taxable income in 1959 of $50,000 will have accumulated earnings and profits as of December 31, 1959 of $150,000 which will on that day be reduced to $100,000.

[154] See Sen. Finance Comm. Rep. No. 1983, 85 Cong. 2 Sess. P. 225—This rule is necessary in order that a corporation may not decrease its current earnings and profits by expenditures and losses which do not qualify as deductions for Federal tax purposes, and thereby defeat the general purpose of taxing the corporation's taxable income as dividends to the shareholders.

[155] Proposed Regulations § 1.1377–2(a)(2):

Example (1). Corporation X has $300,000 of accumulated earnings and profits as of the beginning of the taxable year. It would have had earnings and profits of $400,000 for the taxable year (taking into account a net capital loss of $100,000, which amount was not deductible in determining its taxable income) but because it is an electing small business corporation it has earnings and profits of $500,000 for the taxable year. If the corporation makes a dividend distribution during the year in the amount of $500,000, all of such amount will be considered a distribution of current earnings and profits. However, the corporation will have only

(c) *Earnings and profits not affected by net operating loss*

Section 1377(c) provides that the current earnings and profits and the accumulated earnings and profits of an electing small business corporation are not affected by any item of gross income or any deduction taken into account in determining the amount of any net operating loss of the corporation.[156] In the absence of a statutory provision to the contrary, the earnings and profits of the corporation would be reduced by approximately the amount by which the corporation's deductions for the taxable year exceeded its gross income that year. Since this amount would also be allowable as a deduction to the shareholders, and since a reduction in a corporation's earnings and profits has the potential effect of allowing earnings to be withdrawn from a corporation in the form of capital, a double benefit

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$200,000 of accumulated earnings and profits as of the beginning of the following taxable year.

Example (2). Assume the facts are the same as in example (1), except that the corporation does not have any accumulated earnings and profits as of the beginning of the year. The entire $500,000 distribution is a distribution of current earnings and profits. As of the beginning of the year following the taxable year in which the $500,000 distribution was made, the corporation has neither accumulated earnings and profits nor a deficit in accumulated earnings and profits. It would begin such year with its paid-in capital reduced by $100,000.

[156] Proposed Regulations § 1.1377–3(b) gives the following example: "Example. At the beginning of its calendar year 1960 Corporation X, an electing small business corporation has accumulated earnings and profits of $50,000. During 1960 the corporation has $5,000 of gross income and deductible expenses of $15,000, which produce a $10,000 net operating loss for the taxable year. If Corporation X were not an electing small business corporation, its accumulated earnings and profits as of January 1, 1961 would have been $40,000. However, since Corporation X was an electing small business corporation for 1960, its accumulated earnings and profits are not affected by the income and deductions for 1960 because they are taken into account in determining the net operating loss. Accordingly, the accumulated earnings and profits of Corporation X as of January 1, 1961, are $50,000.

to the shareholders might result from a net operating loss in the absence of the provisions of Section 1377(c).[157]

Conclusion

The chief advantage to be derived from the availability of the election by a corporation under Subchapter S is that the legislation permits an owner to become an employee with all the benefits that accrue to an employee, as contrasted with an employer in our modern system of society, with less danger of double taxation than is present in the usual corporate form. This is the heart of the matter. This is the reason why counsel for all small business should carefully review the affairs of their clients in the light of the new legislation.

Subchapter S attempts to rectify, for certain sections of our economy, a basic inequity that exists under our system of taxation, namely the subjection of one and the same economic interest to two separate Federal income taxes. All the complex provisions of the Subchapter are designed to accomplish this end. The reason they are complex is because the rules they are seeking to undo are themselves complex. Thus we see the interplay of the Subchapter with provisions pertaining to partial and complete liquidations, collapsible corporations, capital gains and losses, net operating losses and carrybacks and carryovers, redemptions of stock and the concept of the allocation of earnings and profits to corporate distributions of one kind or another.

In view of the complexity of the problem that the legislation is trying to solve, and in view of the long and tortuous history of the present Internal Revenue Code, it is not surprising that the Technical Amendments Act of 1958 contains areas of doubt, and exhibits the shortcomings that have been described herein.

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[157] Sen. Finance Committee Rep., No. 1983, 85th Cong. 2nd Sess P. 225.

One may well ask whether the attempt to remove double taxation of small business by making the corporation a mere conduit is the best way to accomplish the legislative intent. Perhaps it would have been simpler to allow a deduction for dividends paid to shareholders or some such device. Be that as it may, the attempt is significant in a broader sense since it establishes the principle that for the best interests of business and presumably of the country the present system of taxing a corporation and its shareholders should be changed. If such a concept is good for "small" why not for all business? Particularly when, at least theoretically, a billion-dollar corporation can qualify for the relief? Why the limitation to ten shareholders? Why the limitation to one class of stock? If an estate is an eligible shareholder, why not a testamentary trust to which the shares of a corporation may be transferred in the orderly course of administration?

Merely to ask these questions is enough to indicate the necessity of further study in the area. If the real purpose behind the legislation is what the Senate Finance Committee report says it is,[158] then that purpose is likely to be defeated to the extent that the technical and perhaps unnecessary requirements of the Subchapter tend to discourage businessmen from using the relief provided. For instance, while the provisions as to personal holding company income are fairly liberal, no reason appears why there should by any such limitation at all. The effect of the limitation is to exclude certain businesses which clearly would seem to be the kind that would be entitled to relief under the stated general purpose of the legislation.

Perhaps the greatest sources of potential trouble and the conditions most likely to discourage business are the automatic retroactive termination provisions of Section 1372(e) and the 30 day consent requirement. The language of the proposed regulations pertaining to the Commissioner's consent to re-election[159] is a step in the right direction, but does not solve the problem. If a corporation elects not to be taxed as a corporation, the statute should contain specific and clear provisions so that the advantages of the election would not be forfeited through some unforeseen or unexpected happening that is purely fortuitous and has nothing to do with the over-all general purpose of the legislation as proclaimed by the Congress.

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[158] See Note 3.

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[159] Proposed Regulations § 1.1372–(5).

Consumer Credit Regulation

Alfred I. Maleson*

Consumer credit is such a significant feature of our economic system that it has played a striking part in the development of many consumer products for which the economics of industry rather than government planning are responsible. Indeed, the rapid growth of the television industry is probably as much indebted to the stimulation of consumer credit as it is to electronic engineering skills. The ability to buy a car or appliance on a time plan, to pay bills by check, to drive into a strange gasoline station and drive out with a tankful of gas merely by scribbling a name on a scrap of paper—all involve consumer credit. The legal rules governing consumer credit may be quite different from those governing commercial or business credit because of the difference in the nature of the two types of credit. While a commercial loan is normally designed to be self-liquidating, that is, the loan itself makes possible the earning of profits out of which it may be repaid, a loan used to purchase goods which will be consumed while supplying the means of life, or even of mere pleasure, cannot be repaid unless the borrower has income unrelated to the goods purchased.

By the middle of the last century, sales of furniture, pianos, sewing machines, books, and many other articles were quite commonly made on time payment plans. But the tempo of such sales and the extension of such sales to include an ever widening variety of goods has had its greatest spurt during the past forty years, and that of the past ten years has been simply staggering. This rapid growth is attributable to many factors. With the sale of automobiles, which at first sold chiefly for cash, the development of second hand markets in which a repossessing lender might dispose of his security has played a major role.[1] With some other types of goods, the breakdown of prejudices against consumer debts has been so marked that today three out of every five families in the United States are in debt for the purchase of consumer goods. Consumer debt in 1945, just after the end of World War II, totaled five and one-half billion dollars. By 1950, it had risen to over twenty-one billion, and this year it has reached over forty-four billion—or about eight times the amount existing at the end of World War II.[2] Of this tremendous amount of credit, only one-fourth is represented by charge accounts and single payment loans. The balance is included in installment sales and other time payment plans.

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Very little of this credit is held by retail outlets themselves. Financial institutions hold nearly seven times the amount of credit paper retained by sellers. With automobile paper, finance companies hold about twice as much as banks. With other types of credit, the commercial banks have a slight edge over the finance companies. Obviously, in this atmosphere, there are powerful forces at work, and the theory has developed that the protection of the individual consumer can no more be left to his individual bargaining power than can the employment contract of a single worker in the automotive industry be left to his power to bargain with his employer.

Regulation for Economic Effect

Legal regulations of consumer credit have developed for two distinct purposes: first, to affect the economy of the community, and second to protect the consumer. With consumer credit the important part of our economy that it is, it is not surprising to find that there are economists who have been ready to blame every business recession or depression in the last few decades on the evils of easy credit; and, at the same time, there are others who attribute every recovery to the benefits of easy credit. Federal regulations of consumer credit, recognizing the relationship between controlling credit and a controlled economy, have appeared from time to time, generally to cope with inflationary trends. The first significant regulation took place in September, 1941, before Pearl Harbor, by the Board of Governors of the Federal Reserve Banks, under the Trading with the Enemy Act. The important wartime regulation which is still well remembered by merchants, called Regulation W, lasted until November 1, 1947. Again, from September 20, 1948 to June 30, 1949, credit was regulated although the country was not at war. After the outbreak of the Korean conflict (from September 18, 1950 to June 30, 1952), Regulation W was again in effect.[3]

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[1] See Isaacs, *Installment Selling: The Relation Between Its Development In Modern Business and the Law,* 2 LAW & CONTEMP. PROB. 142 *et. seq.* (1935).

[2] 1 BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, CONSUMER INSTALLMENT CREDIT 25–42 (1957).

These regulations were designed to control the volume of consumer credit by providing for a minimum percentage of down payment and a maximum period for the time payments. The percentage and period varied with the type of goods sold. One very significant feature was that lenders who were not sellers had to determine the purpose of the loan, and if the purpose was to purchase consumer goods, the loan was regulated as if it were a sale.

Historical Development of Consumer Protective Regulations

In contrast with these economic regulations, which vary as the needs arise and which are generally considered to be temporary expedients designed to correct conditions so that they will no longer be necessary, there has been a long history of development of rules designed to protect the consumer, or, occasionally, to legitimize various practices of businessmen which were considered sound but of doubtful validity. These regulations are of the type which never end but grow constantly in scope and complexity.

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[3] *Ibid.* 288 *et. seq.*

Usury Laws

The fundamental laws of this type have been the usury laws which go back at least to Biblical days.[4] These generally prohibit loans for more than a limited rate of interest, though they seldom apply to sales without separate loans. Some ecclesiastical interpretations of usury have included selling goods for too high a price, and even the early English statutes forbad a sale at excessive price, but then only if the vendor intended to repurchase the goods sold at a lesser price.[5] The vice, of course, was that what looked like a sale was really a disguised loan. In New York, the courts have held for well over a century that if a sale is in fact bona fide and not a disguised loan, it is not covered by the usury laws.[6] Therefore, a seller might ask one price of a purchaser for cash and another price of a credit buyer, no matter how much greater the price. In 1938, two cases in the City Court of Rochester did hold that the basic six percent per year rate provided by the General Business Law applied as well to a sale on time as to a loan made to enable the purchase to be made for cash.[7] These cases, though, were so clearly opposed to the long line of precedence already established, that when one of them was appealed the judgment was promptly reversed.[8] The analogy was given by the court to a single price, with a discount for cash, which, the court observed, could not possibly be considered usury no matter how high the discount. The validity of this observation today, in the light of recently enacted laws to be discussed, remains to be seen.

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[4] DEUTERONOMY XXIII, 20.

[5] Berger, *Usury in Installment Sales,* 2 LAW & CONTEMP. PROB. 156–159 (1935).

[6] Dry Dock Bank v. American Life Insurance and Trust Co., 3 N.Y. 344 (1850).

[7] Universal Credit Co. v. Lowell, 166 Misc. 15, 2 N.Y.S.2d 743 (1938); Failing v. National Bank and Investment Corporation, 168 Misc. 617, 6 N.Y.S.2d 67 (1938).

The first stage of regulation, then, concerned the rates of interest and the types of penalties prescribed for violations. The basic rate of interest is established by the General Business Law as six percent per year.[9] As devices to avoid this were devised—for example, making separate charges for investigations—these were generally stopped by the laws dealing with the specific type of lending institution involved. These rates seemed to work fairly well for large loans, but lenders generally found that it was not economically practical to make smaller loans at such rates. As a result, various statutes authorizing higher rates for small loans were enacted. The so called ''Licensed Lender'' in New York, for example, may charge as much as two and one-half percent per month of simple interest on the first $100 which it lends.[10] Even commercial banks may now charge effectively more than six percent on loans up to $5,000, since the six percent rate may be applied to the opening balance of the loan, making an effective rate of about twelve percent. These loans, though, are limited in duration to twenty-five or thirty-seven months, depending on the amount and purpose.[11]

Another important type of loan in the consumer credit field is the Morris Plan loan. This plan was developed before the First World War for the purpose of making it possible to make profitable small loans. The plan worked by requiring the borrower to pay interest on the full amount of the loan though he made periodic deposits on which he received no interest into an account that was pledged to pay off the original loan. Today Morris Plan banks, or industrial banks as they are now known, are quite strictly regulated;[12] but they still may receive more than the customary six percent by being permitted to make a type of service charge based on the amount of the loan.

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[8] Failing v. National Bank and Investment Corporation, 158 App. Div. 778, 12 N.Y.S.2d 260 (1938).

[9] N.Y. GEN. BUS. LAW § 370.

[10] N.Y. BANKING LAW § 352.

[11] N.Y. BANKING LAW § 108.

The early attempts to regulate consumer credit are thus seen to have been directed entirely toward the direct type of credit, that is, the loan. Indirect credit, or credit represented by the time sale, was left completely to the bargaining abilities of the parties. As for the usury aspect of a high time-sale price, the argument made was that the higher charges were justified by cost of investigation, notification, bookkeeping, collection, and so forth. These are the same arguments that had justified higher rates for direct small loans. But those rates, though higher, were still subject to some limitations, while the sale continued quite unregulated.

Conditional Sales Laws

Regulations of time sales finally did come to the fore, through quite a different avenue. Time sellers often wanted some security interest, and the traditional type of security interest on personal property had been the chattel mortgage. But chattel mortgages were cumbersome; they needed the notoriety and expense of recording; and they usually required a fairly rigorous foreclosure procedure in the case of default. Therefore, installment sellers tried a new scheme; they contracted to sell in a form by which all risks passed to the buyer at once but title remained in the seller until the last payment was made. This, of course, was the conditional sale. The most unconscionable part of the scheme was the forfeiture provision whereby, on any default, the seller could retake the property as if the sale had never been made. The courts of several states refused to recognize the retention of title by the seller in these cases, either because of the inconsistency of saying that something which looked like a sale was not a sale or else because of their distrust of secret liens. But the courts of most states, including those of New York, found nothing objectionable in these conditional sales though the buyer was always in jeopardy of losing everything he had paid and the goods purchased as well.[13]

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[12] N.Y. BANKING LAW § 290 *et. seq.*

Legislation in the form of the Uniform Conditional Sales Act came to many states, including New York,[14] with two major purposes. First, the act made it clear that conditional sales were perfectly valid transactions. At the same time, however, it provided for serious regulation both of the sale itself and also of something akin to a foreclosure proceeding. In regulating the form of the sale, the heart of the act is in the disclosure sections which require conditional sales of consumer goods to be in writing and the writing to contain certain specific information, including all computations of service charges and other charges. But unlike the usury laws, no attempt was made to go beyond disclosure by regulation of the charges permitted. After providing for compulsory disclosure, the legislature apparently was satisfied to allow a buyer to sign the document no matter what its terms. This act, then, did not bring the usury laws into sales.

The way in which it did protect a buyer from his own bad bargains was by providing for a series of rules that were designed to prevent hasty foreclosures and, at any event, to prevent unjust forfeitures. Actually, the disclosure requirements are seen to be of lesser importance even on the face of the act, since they apply only to consumer goods, and then only when such goods are of relatively low value, while the foreclosure rules apply to all conditional sales.

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[13] Ballard v. Burgett, 40 N.Y. 314 (1869).

[14] N.Y. PERS. PROP. LAW § 61 *et seq.*

The conditional sales law validated such sales between the parties and also validated the security interest reserved by the seller against others than the buyer provided that he file the agreement, with a ten day period of grace allowed against early adverse claimants. The penalties for violating the disclosure provisions consist of a refund of carrying charges, or ten percent of the price if no charges are stated. To prevent hasty repossessions, notice at least twenty days prior to the retaking is required, if the seller expects to cut off the buyer's right of redemption. Even if this notice is not given, at least a five day notice is required or the seller will not be entitled to his expenses of retaking. Thus, the seller still has the right to repossess the property sold without giving any notice, but he must pay a double price to exercise this right: first he loses the expenses incurred; and second the buyer may redeem the property by paying the balance due at the time of repossession.[15] A seller who feels he must act swiftly if he is to locate the property, and locate it in a saleable condition, may be willing to pay this price. At the same time, it is high enough to deter hasty action which might not be warranted by the circumstances.

After the repossession, the seller must resell the property, if the buyer demands it or if at least fifty percent of the price has been paid; and the resale must be in accordance with the statutory requirements.[16] After a resale, the proceeds must be accounted for to the buyer if there is an excess; and although the seller is still entitled to any deficiency, the buyer of consumer goods is not necessarily bound by the actual resale price in computing this deficiency. If a seller who is obligated to resell does not do so, the buyer is entitled to damages of at least one-fourth of the payments he has made.[17]

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[15] N.Y. PERS. PROP. LAW §§ 77, 78.

[16] N.Y. PERS. PROP. LAW § 79.

Modern Statutory Schemes

Until recently, then, the only regulations of consumer sales financing in New York were through the usury laws if the financing was direct and through the very limited regulation of conditional sales laws if the financing was indirect. Had the Uniform Commercial Code been adopted in New York instead of passing into a state of limbo, it would have provided no additional hope to the borrowing consumer, for a note to the section on *Secured Transactions* provides: "This Article . . . does not prescribe regulations and controls which may be necessary to curb abuses arising in the small loan business or in the financing of consumer purchases on credit." A movement had started at least as far back as the 1930's for comprehensive regulation of consumer sales, with Indiana passing the first comprehensive act in 1935 and many other states following.[18] Governor Harriman, in his annual messages to the legislature in 1955, 1956, and 1957, requested legislation to protect buyers from overcharging and fraudulent practices; and, with the spark provided by the office of the Consumer's Council to the Governor which contacted district attorneys, better business bureaus, legal aid societies, settlement houses, consumer groups, and others, the legislature of New York enacted the Motor Vehicle Installment Sales Act into Law in 1956,[19] and in 1957 the Retail Installment Sales Act[20] (commonly dubbed the "All Goods Act") followed. The

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[17] N.Y. PERS. PROP. LAW § 80e.

[18] Foster and Foster, *Rate Aspects of Installment Legislation,* 2 LAW & CONTEMP. PROB. 195–197 (1935).

[19] N.Y. PERS. PROP. LAW Art. 9.

[20] N.Y. PERS. PROP. LAW Art. 10.

Governor promptly hailed these measures as the first of any state to protect the time buyer under any plan, whether the sale was with or without a lien, or on a revolving credit account. Actually, New York was somewhat of a latecomer in this field of regulation; but when it did act, it purported to do a thorough job.

The complaints of buyers that led up to these acts were many, including failure of the buyer to receive a copy of the contract, blanks left unfilled, variation in terms of promises, concealment of charges, nonallowance of prepayments to save charges, negotiable instruments problems if shoddy merchandise was received, but a note was in the hands of a finance company, wage assignments, and many other ''sharp practices.'' It was chiefly these complaints which the two acts were designed to attack. After a brief experience with them, both acts have been peppered by amendments enacted by the 1958 session of the legislature. It is important to note that although these acts may affect the operation of the usury laws and conditional sales laws to some extent, they do not supersede those laws but are cumulative in their regulatory aspects.

Regulations under the New Statutes

Unlike the conditional sales act, the price of the sale is not a criterion to be used to determine whether or not the disclosure provisions of these acts apply. Also unlike the conditional sales act, commercial as opposed to consumer sales are completely unregulated. Included in the coverage are three different plans for sales in which two or more installments of the price are to be paid. The first is called the ''Retail Installment Contract.'' It applies to any time sale when some security interest is retained by the seller. The act, however, does not create any new security interest. The interest retained may be any of the traditional types, *i.e.,* conditional sale, chattel mortgage, bailment lease, or whatever else might be available. The distinctions between conditional sales and chattel mortgages, therefore, must still be drawn. A seller who wishes to protect his security interest against persons other than the buyer must still file his agreement among the appropriate records with the penalty of finding that he is not protected if, for example, he should file as a chattel mortgage what in reality is a conditional sale.

The second type of regulated sale is called a ‘‘Retail Installment Obligation.’’ It also covers all time payment sales of consumer goods made by separate agreements, though it involves those sales in which the agreement does not provide for the reservation of a security interest. The third type of regulated sale differs from the prior two in that the regulations will apply only if a service charge is added to the price. This type is known as the ‘‘Retail Installment Credit Agreement,’’ commonly known as a ‘‘revolving credit’’ account, used when the buyer agrees to pay the balance of his account by two or more installments as distinguished from payments for each sale by installments. Although the *contracts* and *obligations* are regulated whether or not a service charge is added, none of the provisions of the act, including the writing requirements, are applicable if a credit agreement is used.

The really sweeping effect of the act is seen when the definition of ‘‘sale’’ is examined. A sale includes not only those transactions familiar to the law of sales but also agreements for attaching personal property to realty and even agreements for many sorts of labor and services which may involve goods. Apparently, an agreement for the furnishing of services to goods under a time payment plan is regulated even though the one furnishing the services did not furnish the goods!

Disclosure Requirements and the Delivery Concept

If the installment sale is regulated, the acts require the agreements to be reduced to writing and regulate both the form and content of the writings. The content of a credit agreement, which applies to prospective sales, is naturally somewhat different from that of the contract or obligation incident to present sales, but the theory of full disclosure of all terms in readable type and of some terms and notices in a larger type is adopted for all three forms of sales. The problem of whether or not to allow a buyer to sign an agreement that contains blanks was solved by a compromise permitting such signing in limited cases, if the goods have not yet been delivered and if the blanks are only for the identifying marks of the article sold and the due date of the first installment. (Installment sellers generally, and outside salesmen in particular, wanted to be able to get a buyer's signature while they could, leaving the details of the agreement to be filled in by their office personnel later.) In addition to this limited filling in of blanks after the agreement has been made, there is one other situation under which the seller may be relieved of some of the burdens of this rather detailed disclosure and obligation to make on-the-spot computations. One "covering" agreement may serve any number of future sales provided that they are for no more than $175 each, and provided also that at least a sales slip is furnished for each sale containing the notice that it is part of a retail installment obligation and disclosing the major terms of the sale.[21] Credit service charges, the time balance, and the time price may then be sent to the buyer later. The price the seller must pay for this inroad into the buyer's right to know is, however, quite severe when judged by the penalties imposed for non-compliance with most of the act; for if the seller does not send the buyer these details within ten days, the buyer is not limited to a refund of service charges but may recover a full refund, apparently even if the goods have been delivered.

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[21] N.Y. PERS. PROP. LAW § 403(7), added by Ch. 687, Laws of 1958.

Not only must the agreement be in writing, but it must also be delivered to the buyer who will have a right to rescind the undelivered agreement if he has not yet received the goods purchased.[22] Thus, the act expands the statute of frauds by making unwritten agreements unenforcible by the seller, and adopts a delivery concept ordinarily found in the law concerning deeds to realty.

Service and Delinquency Charges

In addition to the attempts to broaden the disclosure aspects of the conditional sales laws and bring them into all types of consumer time payment transactions, these acts also made highly modified usury laws applicable to the transactions. Probably one of the most difficult tasks for the framers of the acts was the selection of rates adequate to warrant a seller in continuing with installment selling and at the same time low enough to protect the buyer from "sharp practices." Although many classifications might be justifiable in setting different maxima, only two major categories were chosen: automobiles, and all other goods and services. The rates permissible in the sale of automobiles vary only with the age of the car, not with the amount of the sale: from seven percent for a new car sold during the year it is new, to thirteen percent for used vehicles more than two years old. Insurance, however, may be financed at a maximum of seven percent regardless of the age of the vehicle involved. With other goods and services, the maximum rates depend on the amount involved, ten percent being permitted on amounts up to $500 and eight percent on amounts over $500, under the theory that the cost of servicing an account does not rise proportionately with the amount of the sale. These rates are computed on a yearly basis, on the principal balance at the time of making the sale. Thus, if the payments will continue for two years, the rates applied to the principal balance are doubled, while if the account is to be paid off in six months, half rates are to be used. The effective rate of return is actually about double the nominal rate, since the rates are applied to the first balance, though each subsequent payment will reduce the balance.

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[22] N.Y. PERS. PROP. LAW § 405.

In order to insure a fair application of the rates allowed, the price at which the dealer would sell for cash must be stated. The subterfuge of allowing a discount for cash, which in reality makes the credit buyer pay more than the permissible maximum, is prohibited indirectly, though such a practice might be quite difficult for the credit buyer to detect. The charges provided for are the only additional charges which may be made at the time the contract is entered into.

Prepayments, with a refund of the unearned portion of the stated charges, is always permitted, whether or not provided for by contract. Here, however, as with short term or low priced sales, the dealer may always be assured of a stated minimum return.

Although additional charges may not be added in the initial transaction, delinquency and collection charges are permitted, though regulated. No charge may be made unless the default continues for at least ten days, only one charge may be made per defaulted installment, and the maximum charge is the *lesser* of $5.00 or five percent of the installment.[23] Attorney's fees actually incurred by an attorney not an employee of the seller are recoverable, limited to fifteen percent for vehicles and twenty percent for all other goods and services. A request was made by some groups for a prohibition against repossession, in the case of secured transactions, until after the second default. However, the dealers argued that if they were forced to wait so long the goods would never be found and the repossession provisions of the conditional sales act were not modified.

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[23] The limitation to one charge per defaulted installment is not found in the Motor Vehicle act.

Specific Prohibitions

Both the motor vehicle and all goods acts contain a large number of prohibitions, though in somewhat different terms. Thus the motor vehicle act makes unenforcible such things as wage assignments, security on other goods, arbitrary acceleration, confessions of judgment, and substitutions of security.[24] The all goods act states that the agreement shall not require these things, so that the effect of non-compliance may be penal as well as non-enforcement.[25] The Supreme Court of Nassau County, in Special Term, has already had the occasion to sustain the spirit of these prohibitions by refusing to allow any effect to be given to an assignment of wages contained, not in the contract of sale, but in a separate instrument.[26] Thus, this form of security is no longer available in connection with the sale of consumer goods under retail installment contracts or obligations.

Defenses Against Financing Agencies

Both acts prohibit the execution of notes which, if negotiated separately, will cut off defenses which the buyer might have had against the seller. This provision leads to a peculiar anomaly—if a buyer pays cash, his sole redress for breach of warranty is against the seller; if he borrows directly from a lender and pays cash to the seller, again his redress is against the seller only, and his obligation to the lender continues; but if he borrows from a lender indirectly, through the seller, he may have a defense against his obligation to the lender. A compromise arrangement, however, does allow a lender to become a "holder in due course," under some circumstances. If, upon purchasing a contract or obligation, the financing company notifies the buyer that it has done so, and tells him with the proper language and in the specified size type that unless he makes known his defenses they will be lost, then the defenses may indeed be lost unless the buyer notifies the financing company within ten days! It is not at all clear whether this notice must be specific or whether a general type of notice by the buyer will still enable him to utilize defenses of breach of warranty for defects which cannot be discovered within the ten day period.

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[24] N.Y. PERS. PROP. LAW § 302.

[25] N.Y. PERS. PROP. LAW § 403.

[26] In re Finklestein, 11 Misc. 2d 938, 174 N.Y.S. 2d 126 (Sup.Ct. 1958).

The charges made by the finance company to the dealer are not regulated. Any price may be paid for the installment contract or obligation, no matter how little, without the discount constituting usury.

Revolving Credit and Merchandise Certificates

Retail Installment Credit Agreements, like the contracts and obligations, must be written, dated, and delivered, and must contain no blanks. This writing is required, however, only if a service charge is made. Charges may be made monthly, and statements must be rendered monthly. Maximum monthly charges range from one and one-half percent of the first $500 of the account to one percent of the balance, with a minimum of seventy cents per month. Delivery of the agreement is essential to the right to make these credit charges, but the opportunity of the buyer to rescind a undelivered purchase because of non-delivery of the document is not applicable. The use of notes cutting off defenses if negotiated separately is prohibited, but the provision that the buyer may waive defenses against a finance company by failure to respond to the ten day notice is absent, as are the prohibitions against wage assignments and confessions of judgment.

Merchandise certificates represent a peculiar type of arrangement, included in the 1958 amendments at the request of merchants rather than consumer groups, in order to insure their continued validity. Two types are involved: those purchased for gifts and those purchased for personal use by buyers who find this a convenient way to budget their purchases. Those purchased for use as gifts present little problem. If they are purchased on time payment plans, the actual credit service charge theoretically ought to depend on the time that the certificates are redeemed by the donee, since until that time the store which issued them has received money without parting with goods. However, as it would be a very awkward burden to require the store to keep track of payments and redemptions in such a way that it could begin charging a service charge only from the time of redemption, and as maintaining the installment account does involve some expense, it seems unobjectionable to allow service charges to be added to the initial price, as with other sales. This the act now does.

When it comes to merchandise certificates purchased by a consumer for his own use, however, it seems at first blush to be patently usurious to allow the store to charge a service charge for the privilege of paying in advance for merchandise to be purchased at some later date. But this the act also condones! The reason for this strange set of affairs, though, is a practical one which can cause little harm to those buyers who seem to prefer this method of budgeting their payments. Apparently, such certificates are almost always purchased in small amounts, of five, ten, or fifteen dollars, or something of that order. The purchaser has the pleasant feeling that by paying a small weekly amount he or she has an immediate purchasing power which may be exercised whenever he or she sees fit, piecemeal, for articles that cost even less than the amount of certificates held. Again, to require the store to keep tabs on each such certificate, charging a service charge only on the portion actually redeemed, seems an unwarranted burden. The act does provide that unredeemed certificates which have been paid for may always be turned back for a cash refund, the refund to include the service charge paid. A purchaser who wants to take the trouble to cash in unredeemed certificates may do so and purchase for cash, saving the charges.

Penalties

Although the Governor had asked that violators of these acts respond in treble damages, the legislature was somewhat more lenient. For willful violation of the motor vehicle act, the seller may be fined for committing a misdemeanor. For any violation, willful *vel non,* service charges are barred, though this civil penalty may be avoided by correction of the violation within ten days after notice.[27] In addition to these penalties, the Vehicle and Traffic Law authorizes suspension or revocation of the license of a dealer who willfully violates the requirements.[28]

The all goods act provides for similar penalties, though with one curious difference. While the motor vehicle act allows avoidance of *only* the civil penalties by correcting the violation, the all goods act allows avoidance of any penalty *except* the civil penalty for one type of violation, *i.e.,* a willful violation in connection with computations of charges in add-on agreements.[29]

Considering the rather weak nature of these penalties and the possibilities of undetected evasion by sellers who may actually give substantial discounts to customers who pay cash, though those same dealers may add service charges to list prices for time purchasers, the only really effective enforcement of these acts would seem to lie in the education of consumers and in the honesty of the bulk of the merchants who, by complying with the requirements as a routine matter, will raise the standards of morality involved in time sales.

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[27] N.Y. PERS. PROP. LAW § 307.

[28] N.Y. VEHICLE & TRAFFIC LAW § 62(9).

[29] N.Y. PERS. PROP. LAW § 414.

Comments

Does New York State Have A Kangaroo Court?

Webster defines "kangaroo court" as "an irresponsible, unauthorized, or irregular tribunal or one in which, although conducted under some authorization, the principles of law and justice are disregarded or perverted."[1] It is said to be so named because its justice progresses by leaps and bounds.[2] There are few references to such a court in the reports except for an occasional case involving a kangaroo court organized by prisoners. Apparently in some of the states they were well established institutions encouraged by sheriffs and jailers.[3] The jailers' rules were augmented by several rules of the kangaroo court on the pretense of furthering the work of the jailer in maintaining a fit and suitable place to confine his prisoners. In a number of instances the rules provided for severe punishment without disclosing the nature of such punishment.[4] The prisoners would organize a so-called "kangaroo court" whenever a new prisoner was admitted to the jail, for the trial of that new prisoner on some spurious charge alleged to have been committed by him against them or any of them,[5] or based on the infraction of one or more of their rules.[6] Upon conviction, a pretended fine was assessed against him, and for his failure or refusal to pay the fine he would be seized and overpowered without means of self protection and subjected to a penalty which took all forms of physical punishment.[7]

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[1] Webster, New International Dictionary (2nd ed. 1946); Ballentine, Law Dictionary (1948 ed.).

[2] Webster, New World Dictionary (coll. ed. 1956).

[3] Riggs v. German, 81 Wash. 128, 142 Pac. 479 (1914).

[4] Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927 (1897).

[5] Blakeman v. City of Wichita, 93 Kan. 444, 144 Pac. 816 (1914).

[6] Lamb v. Clark, 282 Ky. 167, 138 S.W.2d 350 (1940).

The procedure whereby the New York Board of Pharmacy may promulgate rules which have the force of law,[8] investigate alleged violations of such rules, determine the guilt or innocence of the accused violator, penalize him and bind the appellate court with its finding of facts is not unlike that of these "kangaroo courts." An analysis of article 137 of the New York State Education Law discloses that the Pharmacy Board is composed of nine licensed pharmacists who have legally practiced as such for at least ten years in the state.[9] Nominations for appointment by the Board of Regents to the Pharmacy Board are made by the New York State Pharmaceutical Association,[10] a trade association of retail pharmacists, and nomination is, in practice, tantamount to appointment.[11] Analysis further discloses that the Board is given power to make such rules, approved by the regents, and not inconsistent with law, as may be necessary to properly perform its duties.[12] One of the enumerated powers is to regulate and control the sale of drugs dispensed in New York State.[13] A statutory definition of the word "drugs" is provided.[14] Certain drugs are

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[7] Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927 (1897); Eberhart v. Murphy, 110 Wash. 158, 188 Pac. 17 (1920).

[8] 42 AM. JUR. *Pub. Admin.* § 102 (1942).

[9] N.Y. EDUCATION LAW § 6802 (1),(4).

[10] N.Y. EDUCATION LAW §§ 6802 (2),(3); 6801 (1).

[11] Annual Report of the Jt. Legis. Comm. on Imitation Food Products and Problems, N.Y. Leg. Doc. No. 56, 66 (1958).

[12] N.Y. EDUCATION LAW § 6802 (4).

[13] N.Y. EDUCATION LAW § 6802 (7)d.

[14] N.Y. EDUCATION LAW § 6801 (14)a-d.

14. "Drugs" means:

a. Articles recognized in the official United States pharmacopoeia, official specifically listed in Schedules "A," "B" and "C,"[15] the provisions of article 137 having no application to the sale by merchants of the articles in Schedule "C."[16] The Board, however, is given statutory authority to add to or delete from any of these schedules[17] and in accordance therewith, it has promulgated a rule whereby Schedules "A" and "B" are supplemented by a listing of additional medicines and by the vague language, "any other drug or medicine if the contents of its container, or any part thereof, taken at one time, are likely to prove poisonous, deleterious or habit forming."[18]

By statutory construction article 137 limits its application, with certain exceptions not here material, to the sale of drugs which are not proprietary medicines.[19] The article does apply, however, to those proprietary medicines which are poisonous, deleterious and/or habit forming.[20] Yet nowhere in the statute nor in the rules of the Pharmacy Board has an attempt been made to define "proprietary medicine." It is apparently left to the discretion of the

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homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement to any of them.

b. Articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals.

c. Articles (other than food) intended to affect the structure or any function of the body of man or other animals.

d. Articles intended for use as a component of any article specified in paragraphs a, b, or c; but does not include devices or their components, parts or accessories.

[15] N.Y. EDUCATION LAW § 6813 (1).

[16] N.Y. EDUCATION LAW § 6816 (2)d.

[17] N.Y. EDUCATION LAW § 6813 (5).

[18] The University of the State of New York, State Education Department, Professional Education, Pharmacy, Law, Rules and Information, Handbook 11, Rule 17, 127 (1956).

[19] N.Y. EDUCATION LAW § 6816.

[20] *Ibid.*

Board and to a gradual process of judicial inclusion and exclusion.[21]

The Board has broad investigative powers, with authority to employ inspectors [22] and conduct investigations through officers duly designated by the secretary of the Board.[23]

On further analysis, the statute provides that any unlicensed person who dispenses or sells at retail, drugs, except under the immediate personal supervision of a pharmacist is guilty of a misdemeanor.[24] Certain acts are specifically prohibited, including the "sale, delivery for sale, holding for sale, or offering for sale of any drug, device or cosmetic in violation of this article." [25] There are two catch-all provisions: (1) Any person who violates any provision of the article "in relation to the . . . retailing or dispensing of drugs, devices or cosmetics for which violations no other punishment is imposed," is guilty of a misdemeanor.[26] (2) Any person who violates any of the provisions of article 137 is guilty of a misdemeanor.[27] Criminal sanction for violations is provided, and upon conviction, certain penalties are exacted, including imprisonment or a fine or both.[28] Were this the only sanction, it is not suggested that the accusation of "kangaroo court" could be aimed at the Pharmacy Board. The statute, however, further provides an alternative civil sanction, the choice of prosecution by either procedure to be in the discretion of the Pharmacy Board.[29]

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[21] See, *e.g.,* White v. State Bd. of Pharmacy, 285 App. Div. 486, 138 N.Y.S.2d 448 (1955).

[22] N.Y. EDUCATION LAW § 6802 (7)d.

[23] N.Y. EDUCATION LAW § 6817.

[24] N.Y. EDUCATION LAW § 6804 (3)c.

[25] N.Y. EDUCATION LAW § 6821 (4).

[26] N.Y. EDUCATION LAW § 6804 (3)m.

[27] N.Y. EDUCATION LAW § 6823 (1).

[28] *Ibid.*

[29] N.Y. EDUCATION LAW § 6823 (2).

Pursuant to subdivision 2 of section 6823, a person accused by the Board of any violation of article 137 who is not criminally prosecuted on complaint of such Board shall be given notice either personally or by registered mail to appear before a committee of three or more of the members of the Board which is authorized to fix a penalty. If the alleged violator fails to pay such penalty or denies the violation, the statute requires the commencement of a proceeding before a like committee by service of a copy of the alleged violations, together with notice of hearing, personally, or if personal service cannot be effected, by publication and mailing. The accused has the right to appear at such hearing either personally or by counsel, may produce and cross-examine witnesses and may have subpoenas issued by the Board. Upon submission of the committee's written report and recommendations, the Board, by a majority vote, determines his guilt or innocence and if found guilty, is authorized to fix penalties. "Neither the committee nor the board shall be bound by strict rules of procedure, or by the laws of evidence, in the conduct of these proceedings, but the determination shall be founded upon sufficient legal evidence to sustain it."[30] An "Article 78"[31] proceeding is provided to review the determination of the Board.

At first blush this alternate procedure would indicate, in form anyway, that due process has been afforded. Why give it the "kangaroo court" label? It is when the aggregate of several deficiencies, each of which standing alone does not necessarily deny due process, is compounded and applied to the non-pharmacist, that we have what can be called a true "kangaroo court."

The first, and perhaps most serious, deficiency is the lack of an impartial and unbiased tribunal. Due process of law requires that a hearing in a judicial or quasi-judicial proceeding by administrative officers be by a fair and impartial tribunal.[32] There is no dispute that the Pharmacy Board in trying non-pharmacists for alleged violations of article 137 and the rules of the Board is performing a judicial function. By statute it is made the substitute for criminal prosecution.

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[30] *Ibid.*

[31] N.Y. CIVIL PRACTICE ACT art. 78.

By way of illustration, take the non-pharmacist who runs a corner grocery store. He stocks and sells an item which in his good judgment he believes to be a proprietary medicine, or is not such as would if the contents of its container, or part thereof, were taken at one time be apt to prove poisonous, deleterious or habit forming. From an examination of the provisions of article 137 and the rules of the Pharmacy Board he feels assured that he is not violating the law. The non-pharmacist's difficulty is obvious, however. He has no standard to go by, except for his own better judgment. The Pharmacy Board has refused to furnish him with a list of the proscribed items,[33] and if he refers to the federal code and statutes of other states, he will be completely mislead.[34] Nine times out of ten his own judgment proves to be wrong,[35] primarily because his lawmaker, prosecutor, judge, jury and disciplinarian is the Board of Pharmacy composed of New York State licensed pharmacists who are vitally interested in protecting the retail druggists' monopoly in the sale of all items regularly found on the shelves of a drug store. What better way to keep the non-pharmacists in submission and strengthen the monopoly? Can it be that these New York State pharmacists have a personal interest in the outcome of the litigation which comes before this administrative tribunal of which they are the appointive members? When the responsibilities of investigator, prosecutor, judge and jury are in the hands of public officers who themselves cannot possibly escape the selfish role of preserving a monopoly in which they have a substantial stake, they are indubitably incapable of holding the scales of justice perfectly true. The Pharmacy Board, in effect, becomes the judge of its own cause, just as in *Dr. Bonham's case.*[36] In that case letters patent incorporated the Royal College of Physicians with power to fine anyone who practiced medicine without admission to the college and with general power to control physicians by fine and imprisonment. One-half of all fines were to go to the King and one-half to the college. Parliament confirmed the letters. Four members of the college were charged with the investigation of all practitioners in London and their punishment. Bonham, who was a Doctor of Medicine of the University of Cambridge, was summoned to appear before these "censors" on the ground that he was not admitted to the college, a penalty was imposed upon him and he was warned under pain of imprisonment not to practice until admitted. Bonham, however, continued to practice and he was thereafter imprisoned for failure to pay a further penalty. In his report of the case, Sir Edward Coke pointed out that since the college was to receive one-half of all the fines, they became not only judges, but also parties in any case before them. To quote his words, "The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, . . ."[37] He framed the following hypothetical which he claimed was based on established common law:

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[32] United States v. Morgan, 313 U.S. 409 (1940); State v. Aldridge, 212 Ala. 660, 103 So. 835 (1925); Federal Const. Co. v. Curd, 179 Cal. 489, 177 Pac. 469 (1918); City of Naperville v. Wehrle, 340 Ill. 579, 173 N.E. 165 (1930); Carr v. Duhme, 167 Ind. 76, 78 N.E. 322 (1906); Matter of City of Rochester, 208 N.Y. 188, 101 N.E. 875 (1913).

[33] See transcript of Public Hearing of Jt. Legis. Comm. on Imitation Food Products and Problems, February 19, 1958, 62, on file in Albany Law School Library.

[34] See 63 YALE L.J. 550 (1954).

[35] This is only an approximation. The writer was denied an interview with the Secretary of the Pharmacy Board and refused the privilege of examining any statistical reports to ascertain the correct proportional disposition of cases under § 6823 (2).

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[36] 8 Coke 114a (C.P. 1610).

[37] *Id.,* 8 Coke 118a.

> So if any act of parliament gives to any to hold, or to have conusans of all manner of pleas arising before him within his manor of D., yet he shall hold no plea, to which he himself is party; for, as hath been said, *iniquum est aliquem suae rei esse judicem.*[38]

Blackstone apparently restricted this common law maxim to those cases where the judge or tribunal had a pecuniary interest. He disclaimed disqualification for bias and prejudice on the theory that judges and justices could not be challenged, for "the law will not suppose the possibility of bias or favor in a judge. . . ."[39] Although Coke's common law rule has been declared to have been incorporated in statutory provisions in New York,[40] it is well established by New York courts that except for mere bias resulting from a remote interest in the question to be decided,[41] and except for those cases of necessity where there would be no other tribunal to administer justice,[42] partiality and bias disqualify the judge or tribunal in a proceeding of judicial or quasi-judicial character.[43] In the *Ryers* case, the court formulated the rule of necessity:

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[38] *Id.,* 8 Coke 118b.

[39] BLACKSTONE, COMMENTARIES *361.

[40] N.Y. JUDICIARY LAW § 14; See Moers v. Gilbert, 175 Misc. 733, 25 N.Y.S.2d (Sup.Ct.), *aff'd,* 261 App. Div. 957, 27 N.Y.S.2d 425 (1941).

[41] Foot v. Stiles, 57 N.Y. 399 (1874).

[42] People *ex rel.* Hayes v. Waldo, 212 N.Y. 156, 172, 105 N.E. 961, 967 (1914); Matter of Ryers *et al.,* 72 N.Y. 1 (1878).

[43] Comm'rs. of Union Drainage Dist. No. 1 v. Smith, 233 Ill. 417, 84 N.E. 376 (1908); Stahl v. Board of Sup'rs., 187 Iowa 1342, 175 N.W. 772 (1920); Hawkins v. Common Council of City of Grand Rapids, 192 Mich. 276, 158 N.W. 953 (1916); Matter of A.E. Fire Ins. Co. v. N.J. Ins. Co., 240 N.Y. 398, 148 N.E. 562 (1925); Wilcox v. Royal Arcanum, 210 N.Y. 370, 104 N.E. 624 (1914); Matter of Ryers *et al.,* 72 N.Y. 1 (1878); Oakley v. Aspinwall, 3 N.Y. 547 (1850); Matter of Atlantic Rayon Corp. (Goldsmith), 277 App. Div. 554, 100 N.Y.S.2d 849 (1950); Matter of

> That where a judicial officer has not so direct an interest in the cause or matter as that the result must necessarily affect him to his personal loss or gain, or where his personal or pecuniary interest is minute, and he has so exclusive jurisdiction of the cause or matter by Constitution or by statute, as that his refusal to act will prevent any proceeding in it, then he may act so far as that there may not be a failure of remedy, or, as it is sometimes expressed, a failure of justice.[44]

The court recognized however the antithesis of the rule:

> For one I should loathe to hold, that by force of a legislative act, one could bring an action in which his interests were involved, in a court of which he was the sole judge, and could sit alone to hear and decide it.[45]

It should be noted that this rule of necessity cannot be properly applied to the Pharmacy Board tribunal when the Board tries an accused non-pharmacist, for a violation of article 137 could be criminally prosecuted and the Board's jurisdiction, therefore, is far from exclusive so as to cause a failure of justice.

The primary purpose of the enactment of what is presently section 14 of the Judiciary Law of New York was to secure to litigants a fair and impartial trial by an impartial and unbiased tribunal[46] and, as was so strongly expressed in the *Union Bag & Paper* case,

> Every litigant is entitled to nothing less than the cold neutrality of an impartial judge who must possess the

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Bender v. Board of Regents, 262 App. Div. 627, 631, 30 N.Y.S.2d 779, 784 (1941); Brooklyn Bar Ass'n v. Kings County Bar Ass'n, 258 App. Div. 920, 16 N.Y.S.2d 751 (1939); People *ex rel.* Pond v. Trustees, 4 App. Div. 399, 39 N.Y. Supp. 607 (1896); People *ex rel.* Union Bag & Paper Corp. v. Gilbert, 143 Misc. 287, 256 N.Y. Supp. 442 (Sup.Ct. 1932).

[44] Matter of Ryers *et al., supra* at 15.

[45] *Id.* at 13.

[46] People *ex rel.* Union Bag & Paper Corp. v. Gilbert, 143 Misc. 287, 256 N.Y. Supp. 442 (Sup.Ct. 1932).

> disinterestedness of a total stranger to the interest of the parties. . . .[47]

The fact that the tribunal is other than a judge or justice does not rule out the application of this statutory principle. The action of the board of trustees of a village in removing from office a street commissioner was reviewed by the court in the *Pond* case.[48] The court first quoted the basic rule from *Oakley v. Aspinwall*:[49]

> The first idea in the administration of justice is, that a judge must necessarily be free from all bias and partiality. He cannot be both judge and party, arbiter and advocate in the same cause. Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.[50]

The court then answered the objection that the board of trustees did not constitute a court, and the trustee who preferred charges was not acting as a judge, by reference to Blackstone's definition of a court.[51] The three constituent parts, *i.e.*, actor, reus and judex, were found to exist.

> In the proceedings now under review, we have the three constitutent parts of a court as Blackstone defined them: The actor [a member of the board of trustees], . . . who complains of an injury done to the public; the defendant, the relator, and the judicial power to ascertain the truth of the charges, the board of trustees.[52]

In arbitration proceedings it has been said:

> While an arbitrator is not a judge in the strict sense, his functions are quasi-judicial in character and he must be a person in a position to act impartially, one who is

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[47] *Id.* at 288, 256 N.Y. Supp. at 444.

[48] People *ex rel.* Pond v. Trustees, 4 App. Div. 399, 39 N.Y. Supp. 607 (1896).

[49] 3 N.Y. 547 (1850).

[50] People *ex rel.* Pond v. Trustees, *supra* note 48, at 403, 39 N.Y. Supp. at 609.

[51] *Id.* at 404, 39 N.Y. Supp. at 610.

[52] *Ibid.*

> not biased or prejudiced in favor of or against either side to the controversy.[53]

Again, the New York Court of Appeals in the *Royal Arcanum* case found no difficulty in applying the principle where the tribunal, composed of officers of a fraternal insurance association was held to be disqualified by reason of bias, prejudice and interest. Judge Miller reasoned

> While the statute (2 R.S. 275, § 2, now Judiciary Law, § 15 [sic]) only applies to judges *eo nominee,* an anomalous situation would exist if the disqualification on grounds universally recognized as sufficient of judges in a body like the Royal Arcanum presented a question merely of irregularity, although a decision of this court would be void if one of its members took part who was without his knowledge related within the sixth degree to one of the parties.[54]

In the now famous case of *Tumey v. Ohio* [55] it was held by the Supreme Court of the United States that the fourteenth amendment had been violated because of the direct pecuniary interest of a mayor who set up a "liquor court" pursuant to statutory authority. By reason of a municipal ordinance, the mayor received costs, in addition to his regular salary, if the defendant were convicted. The pecuniary interest of the mayor in the conviction was not the only reason the Court gave for holding that due process of law had been denied. The trial under the statute was held before the mayor without a jury, without opportunity for retrial and the judgment of the mayor's court could be set aside on review only on the ground that it appear so clearly against the evidence as to indicate some mistake or bias on the part of the trial court. Under the state law one-half of the penalties collected were to go to the state and one-half to the mayor's village, as an added incentive for local communities to enforce the prohibition law. The financial condition of the village was very poor. Chief Justice Taft wrote the opinion.

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[53] Matter of Atlantic Rayon Corp. (Goldsmith), 277 App. Div. 554, 555, 100 N.Y.S.2d 849, 850 (1950).

[54] Wilcox v. Royal Arcanum, 210 N.Y. 370, 378, 104 N.E. 624, 626 (1914).

[55] 273 U.S. 510 (1926).

> With his interest, as Mayor, in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine? The old English cases . . . are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him. . . .[56]

It is interesting to note that the inconsistency of the mayor's position is analagous to that of the Pharmacy Board's; one, the obviously partisan position of all its members with a strong motive for disfavoring the non-pharmacist who would interrupt their well-preserved monopoly, and the other, not only judicial, but legislative and administrative combined.

In *Schechter Corp. v. United States,*[57] Chief Justice Hughes made this observation:

> But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations are familiar with the problems of their enterprises? . . . . The answer is obvious. Such a delegation of legislative power is unknown to our law

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[56] *Id.* at 533.

[57] 295 U.S. 495 (1934).

> and is utterly inconsistent with the constitutional prerogatives and duties of Congress.[58]

And in the extreme case of *Carter v. Carter Coal Co.*[59] the distinction was drawn between legislative delegation to public officials composing a commission and delegation to private interest. The statute in that case gave authority to a certain proportion of those engaged in the coal industry to fix minimum wages and maximum hours of labor. Mr. Justice Sutherland's description of this procedure emphasizes the importance of the maxim that no man should be a judge in his own cause.

> The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.[60]

It should be noted that the statute in the *Carter* case was subsequently amended to cure the constitutional defect.[61]

No claim was made in *Johnson v. Michigan Milk Marketing Board*[62] that any member of a statutory constituted milk board had acted unfairly or arbitrarily, but the act was found by the highest court in Michigan to be fatally defective because of the composition of the board. The statute in that case provided for a five-member board consisting of the commissioner of agriculture, two milk producers unconnected with distribution, a distributor, and a consumer unconnected with production or distribution. The board's duty was to fix prices and regulate the milk industry. Johnson was the fourth largest distributor of milk in the Detroit area. It was felt that the board as constituted under the statute was "of such a nature that Johnson was not, and could not have been, accorded that impartial hearing which satisfies the requirements of due process."[63] There was, however, a strong dissent in this case based mainly on the fact that this administrative board was a rate-making body and its powers were purely legislative and not judicial. The dissent recognized the maxim of law that no one ought to be a judge in his own cause but claimed it applies to judicial action, not legislative.[64]

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[58] *Id.* at 537.

[59] 298 U.S. 238 (1935).

[60] *Id.* at 311.

[61] See Sunshine Coal Co. v. Adkins, 310 U.S. 381, 387 (1939).

[62] 295 Mich. 644, 295 N.W. 346 (1940).

A similar objection could not be raised successfully against the statutory procedure outlined for the New York Board of Pharmacy. It is not doubted that its action is judicial in nature. No amount of interpretation or construction is needed to determine that. Yet, here is an administrative arm of the state composed of representatives of only one profession entrusted with the power to regulate and control their competitor. Can it not truthfully be said, a fortiori, that the non-pharmacist is not accorded an impartial hearing which meets the due process minimum? Is he not in the hands of a "kangaroo court"?

Moving then to the other procedural aspects of section 6823, subdivision 2 which in the composite could justify titling the Pharmacy Board, a "kangaroo court." The New York Court of Appeals recognized in an early case that due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive.[65] The same court has recently reiterated this principle.[66] Cooley states that

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[63] *Id.* at 660, 295 N.W. at 353.

[64] See 54 HARV.L.REV. 872 (1941); 89 U. PA. L. REV. 977 (1941).

[65] Stuart v. Palmer, 74 N.Y. 183, 190 (1878).

> Due process of law in each particular case means such an exertion of the powers of government, as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.[67]

The instant statute permits notice by publication, although personal service must first be attempted. This would be far from sufficient were the proceeding in the form of a civil or criminal action. A final and binding determination of the rights in personam of a party given notice by publication and adjudicated by an administrative agency in exercising judicial powers has been found by one court to deny due process where appellate review of the evidence produced before the administrative tribunal was without power to try the case de novo.[68] It has been difficult, however, to formulate with any amount of meaningful generalization a rule covering the requirements of notice and hearing in the various fields of administrative action.[69] The type of power being exercised by the administrative agency, the nature of the asserted right, the affect on that right by the action, and the existence of other factors which might operate to safeguard the rights of individuals and prevent arbitrary action will determine the constitutional requirements for notice and hearing.[70] It comes very close to the line beyond which constitutional safeguards should not be compromised when after notice by publication an administrative agency, equipped with legislative, administrative and judicial functions, can take property in the form of substantial penalties from individual parties through the exercise of its judicial power with only limited judicial review given by the statute governing such agency.

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[66] Hecht v. Monaghan, 307 N.Y. 461, 121 N.E.2d 421 (1954).

[67] COOLEY, CONSTITUTIONAL LIMITATIONS 741 (8th ed. 1927).

[68] Elk River Coal & Lumber Co. v. Funk, 222 Iowa 1222, 271 N.W. 204 (1937); Annot., 110 A.L.R. 1415.

[69] See Hale, *Administrative Hearings Under the Federal Constitution,* 30 KY. L.J. 137 (1942); Hankins, *The Necessity for Administrative Notice and Hearing,* 25 IOWA L. REV. 457 (1940); 11 U. PITT. L. REV. 130 (1949).

[70] 1 N.Y. JUR. *Admin. Law* § 126, 485; See also Betts v. Brady, 316 U.S. 455, 462 (1941); Hagar v. Reclamation District No. 108, 111 U.S. 701, 708 (1884); Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

Although it is a general rule that even in the exercise of judicial or quasi-judicial powers, administrative proceedings are not bound by formal rules of evidence or procedure, when the determination of the particular agency is made conclusive in any action brought by the state to recover a penalty assessed by such agency, as in the instant case, it is also apparent that the borderline for minimal requirements of due process has been reached. When it is considered that all forms of incompetent evidence are admissible, that any irregularity in established legal procedure is overlooked and that there is no requirement of consistency in decision, in spite of the fact that the statute requires that any "determination shall be founded upon sufficient legal evidence to sustain it," it is difficult to find that the non-pharmacist against whom a penalty has been assessed has had his day in court. Except for the fact that the statute provides for an Article 78 proceeding, this loose and informal procedure would hardly afford due process under the most lenient standards. Benjamin, in his report on administrative adjudication, dealt with the activities of the Pharmacy Board prior to the enactment of present section 6823, subdivision 2,[71] and he stated in regard to the action by the attorney general under the statute then in existence:

> The attorney-general usually endeavors to settle the matter without litigation, but, if litigation is necessary, he prosecutes it. In such case, the courts have held that the proceedings before the Pharmacy Violations Committees

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[71] Laws of 1953, ch. 457.

> have no probative value whatever and that the entire question of violation is to be litigated *de novo*.[72]

The Article 78 proceeding is a judicial review limited to questions of law, to whether or not the determination of the agency was supported by substantial evidence and to whether or not such action was arbitrary, capricious or unreasonable.[73] An administrative agency has little short of absolute power to make appropriate administrative determinations and the visitation power of the court is a narrow one indeed.[74] It is generally stated that a court may not review or disturb the exercise of discretion by an administrative agency where the agency has jurisdiction and power, in the absence of a clear showing that such discretion has been exercised illegally, arbitrarily or unreasonably.[75] And under the doctrine of *Gray v. Powell*[76] which has been followed by the New York courts,[77] matters of statutory interpretation are left in the main to the administrative agency. The issue on review is not what proper interpretation of the statutory language is, but whether that interpretation as adopted by the administrator was arbitrary or unreasonable.[78] Furthermore, the measure of punishment or penalty imposed by the agency may be reviewed, but a determination on this basis is annulled only if the imposition is "so disproportionate to the offense, in the light of the circumstances, as to be shocking to one's sense of fairness."[79] Justice Frankfurter, in a dissenting opinion, spoke of the review accorded under an Article 78 proceeding by one of the New York courts:

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[72] BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 152 (vol. IV 1942).

[73] Barsky v. Board of Regents, 305 N.Y. 89, 111 N.E. 2d 222 (1953); Matter of Lynch's Bldrs. Restaurant v. O'Connell, 303 N.Y. 408, 103 N.E. 2d 531 (1952); Matter of Humphrey v. State Ins. Fund, 298 N.Y. 327, 83 N.E.2d 539 (1949); Staten Island Edison Corp. v. Maltbie, 296 N.Y. 374, 73 N.E.2d 705 (1947); Matter of Miller v. Kling, 291 N.Y. 65, 50 N.E.2d 546 (1943).

[74] Wager v. State Liquor Authority, 3 App. Div.2d 934, 163 N.Y.S.2d 1020, *affirming* 151 N.Y.S.2d 274 (Sup.Ct. 1956), *rev'd,* 4 N.Y.2d 465, 151 N.E.2d 869, 176 N.Y.S.2d 311 (1958).

[75] Matter of Marburg v. Cole, 286 N.Y. 202, 36 N.E.2d 113 (1941).

[76] 314 U.S. 402 (1942).

[77] See Matter of Hotel Assn. of N.Y.C. v. Weaver, 3 N.Y.2d 206, 144 N.E.2d 14, 165 N.Y.S.2d 17 (1957).

[78] *Id.* at 212, 213, 144 N.E.2d at 18, 165 N.Y.S.2d at 22.

> Thus the highest court of the State of New York tells us, in effect, 'Yes, it may be that the Regents arbitrarily deprived a doctor of his license to practice medicine, but the courts of New York can do nothing about it.' Such a rule of law, by denying all relief from arbitrary action, implicitly sanctions it; and deprivation of interests that are a part of a man's liberty and property, when based on such arbitrary grounds, contravenes the Due Process Clause of the Fourteenth Amendment.[80]

On the other hand, courts will not probe the mental processes of the deciding members of an administrative tribunal.[81] The Court gave the reason for this in the fourth *Morgan* case. "Just as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected."[82] There is also a well settled presumption that official acts or duties have been properly performed.[83]

In the one reported case where an Article 78 proceeding has been taken to review the determination of the New York Pharmacy Board, Judge Bergen concludes:

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[79] Stolz v. Board of Regents, 4 App. Div. 2d 361, 364, 165 N.Y.S.2d 179, 182 (1957).

[80] Barsky v. Board of Regents, 347 U.S. 442, 469 (1954).

[81] Morgan v. United States, 304 U.S. 1, 18 (1938); Matter of Kilgus v. Bd. of Estimate of City of N.Y., 308 N.Y. 620, 628, 127 N.E.2d 705, 710 (1955); Matter of Weeks v. O'Connell, 304 N.Y. 259, 265, 107 N.E.2d 290, 293 (1952); Wisconsin Telephone Co. v. Pub. Serv. Comm'n, 232 Wisc. 274, 287 N.W. 122 (1939).

[82] United States v. Morgan, 313 U.S. 409, 422 (1940).

[83] 22 C.J. *Evidence* § 69 (c), 130.

> Authority to penalize violations of Art. 137 of the Education Law regulating pharmacy is vested in the Board. . . . The sale itself is not disputed and we have no difficulty in holding that zinc oxide ointment is a 'drug'; not merely because of its listing in the pharmacopoeia but because it readily falls within the class of 'articles' intended for the treatment of disease or to affect a structure or function of the body. . . . The petitioner was given a full notice of charges required by the statute and by procedural due process and appeared at the hearing. The determination was within the statutory powers of the Board; its conclusion is not unreasonable and should be confirmed.[84]

Does the Article 78 proceeding afford the non-pharmacist the safeguards for the protection of his individual rights which the settled maxims of law prescribe? Whether or not his situation, in the light of the above considerations, can be properly termed "confiscation," it is noted that the Supreme Court of the United States has recognized in the *Ben Avon* case that as a matter of constitutional right the owner of property was entitled to a fair opportunity of submitting the issue of confiscation to a judicial tribunal for determination upon its own independent judgment as to both law and facts.[85]

Finally, it is observed that nowhere in the procedure outlined in section 6823, subdivision 2 has provision been made for a jury trial. Under the New York State Constitution the trial by jury, in all cases, in which it has heretofore been used, shall remain inviolate forever.[86] There is no doubt that the right to a jury trial in actions to recover a statutory penalty existed at the time of the adoption of the Constitution.[87] Regardless of the fact that this may be a newly created statutory penalty, it is subject to any constitutional regulations relative to the class of penalties generally. The constitutional right to a jury trial exists not only in cases in which it existed at the time of the adoption of the constitutional provision preserving it, but it exists in cases substantially similar thereto,[88] and such right cannot be made a nullity by legislative action.[89]

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[84] White v. State Bd. of Pharmacy, 285 App. Div. 486, 487, 488, 490, 138 N.Y.S.2d 448, 451–453, appeal denied 285 App. Div. 1194, 141 N.Y.S.2d 826 (1955).

[85] Ohio Valley Co. v. Ben Avon Borough, 253 U.S. 287, 291 (1919).

[86] N.Y. CONST. art. I, § 2.

[87] People *ex rel.* Murray v. Justices, 74 N.Y. 406 (1878); Tenement

Conclusion

The cumulative effect of these many considerations creates a persuasive argument that the alternate method of prosecution for alleged violations which has been delegated to the New York Pharmacy Board parallels that of the "kangaroo court" of prison inmates. Especially is this true when it is realized that the non-pharmacist is being tried by a partial tribunal outside the judicial system, a tribunal which has been given statutory authority to make rules having the force of law for the violation of which he may be tried, convicted and penalized.

Pharmacy is the only profession regulated by administrative agencies in New York by this unique procedure.[90] A search for similar procedure regulating the sale of drugs among the statutes of the several states and federal codes leads to the positive assertion that in no other jurisdiction

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House Dep't of the City of N.Y. v. 200–202 Manhattan Ave., 169 App. Div. 922, per curiam (1915); Colon v. Lisk, 13 App. Div. 195, 43 N.Y. Supp. 364, *aff'd* 153 N.Y. 188, 47 N.E. 302 (1897); Wood v. City of Brooklyn, 14 Barb. 425 (N.Y. Sup.Ct. 1852); Fire Dep't of N.Y. v. Harrison, 2 Hilt. 455 (N.Y. C.P. 1859).

[88] People *ex rel.* Lemon v. Elmore, 256 N.Y. 489, 98 N.E. 408 (1931); Colon v. Lisk, 153 N.Y. 188, 47 N.E. 302 (1897); Wynehamer v. People, 18 N.Y. 378 (1856); People *ex rel.* Killeen v. Baird, 11 Hun 289 (N.Y. Sup.Ct. 1877).

[89] See People *ex rel.* Lemon v. Elmore, *supra,* 98 N.E. 408; 56 HARV. L. REV. 282 (1942).

[90] N.Y. EDUCATION LAW arts. 131–151.

do we find such a measure. A criminal prosecution as for a misdemeanor or a suit in the name of the board for the collection of the penalty assessed by such board with no provision that the board's determination shall be conclusive are the two uniform methods adopted throughout the country.

There is no doubt that a state legislature may in the exercise of its police power impose reasonable restrictions on the sale of drugs and medicines subject, of course, to the requirement that such measure have a tendency to protect the lives, health and safety of the public.[91] It is, however, doubtful that the "kangaroo court" method adopted by the New York State Legislature as a remedy for violations of the Pharmacy Law has a reasonable relationship to the protection of human life, health or safety. *Quaere* whether the deprivation of an accused non-pharmacist of the right to be prosecuted for a misdemeanor in a court of law, at the caprice of an administrative agency has any relationship to these protections.

BETTY N. COLLINS

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[91] 28 C.J.S. *Druggists* § 2 (b) 501.

Discovery and Inspection in New York Negligence Litigation

Under ancient common law rules, no man could be compelled to furnish his adversary with evidence to be used against himself, and discovery by a bill in equity was the exclusive remedy by which one litigant could avail himself of evidence contained in documents within the possession or control of the adverse party. Under the principles of equity jurisdiction as developed originally, the power to enforce a discovery was considered one of the inherent powers of a court of equity. It has been said that every action for equitable relief was in a measure a bill for discovery, or could be made such if the plaintiff chose, upon the theory that a party having an equitable claim had a right to discovery against his adversary, and to have all the proofs upon which his claims depended submitted for the decision of the court.[1]

It was thought that the early common law courts, in the absence of statutory authority, lacked the power to order the inspection of documents prior to trial, unless the document sought to be examined was the very subject of the action.[2] Equity thus began to entertain a separate ancillary suit in aid of the action at law, and, as this remedy proved unwieldy, statutes made a like remedy available in the primary action itself, the ancillary action in time being abolished.[3] Under the old CODE OF CIVIL PROCEDURE, the only method for discovery and inspection of documents prior to trial was upon order after application to the court.[4] These restrictions, imposed through legislative fear that rights might be prejudiced, concededly became too cumbersome and the CIVIL PRACTICE ACT thus provides now that, in addition to applying to the court for an order under § 324, a party may obtain a discovery and inspection by giving notice to his adversary to produce any document referred to in the latter's pleadings and affidavits.[5] Provision is likewise made for disclosure in aid of discovery and inspection, by which a party may be required, upon order, to state by affidavit the location of documents referred to in the application, and thought to be or have been in his possession.[6]

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[1] 17 AM. JUR. *Discovery and Inspection* § 3 (1938).

[2] Peo. ex rel. Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927) (dictum).

[3] N.Y. CIV. PRAC. ACT § 345.

[4] N.Y. SESS. LAWS 1877, ch. 8, §§ 803–09.

A reading of § 324 NEW YORK CIVIL PRACTICE ACT[7] makes it clear that the purpose of the remedy known as discovery and inspection is to permit a party to examine, and, in proper cases, copy or photograph books, documents or articles in the possession or control of the adverse party, and relating to the claim or defense asserted in the action. The absence of mandatory language in § 324, coupled with the language of related Rule 141, RULES OF CIVIL PRACTICE,[8] has been construed by the New York courts as giving them wide discretion in determining whether, in each instance, discovery and inspection shall be granted.[9] The precise limits of that discretion in negligence litigation are as yet undetermined, with some appellate courts seeking to expand them even further, and others apparently satisfied with them as they are. An attempt will be made here to define present policy in the four judicial departments regarding the scope of discovery and inspection, by order under § 324, of documents and articles relating to the claim or defense asserted in a negligence action. Analogous rules governing federal practice will be treated by way of contrast, as will changes in the New York rules proposed by the Temporary Commission on the Courts.

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[5] N.Y. CIV. PRAC. ACT § 327.

[6] N.Y. CIV. PRAC. ACT § 328.

[7] "A court of record . . . may compel a party . . . to an action pending therein to produce and discover, or to give to the other party, an inspection and copy, . . . or permission to take a copy or photograph of a book, document or other paper or to make discovery of any article or property, in his possession or under his control, relating to the merits of the action or of the defense therein . . . ."

[8] "On the return of the application for discovery or inspection, the court shall make such an order . . . as justice requires."

[9] Field v. B. F. Goodrich Co., 124 N.Y.S.2d 256 (Sup. Ct. 1953).

Fundamental distinctions must first be noted between discovery and inspection under § 324 and an examination and inspection had under § 296 CIVIL PRACTICE ACT, pursuant to the examination of a party or persons before trial. The wider scope of § 324 authorizes the production of books, papers or articles relating to the merits or defense of an action, while the narrower scope of § 296 gives no right of general inspection of material produced at examination before trial. Once produced at such examination, books and records may be examined through their custodian or other witnesses, but only to show that they contain relevant entries, which may then themselves be examined for the purposes of recollection or preparatory to offering them in evidence.[10]

An application for discovery and inspection is ordinarily made after issue is joined, to enable the parties to prepare for trial. This requirement is not absolute, however, and an application may be made before joinder of issue, and apparently subject to the same rules governing the right to examine under § 296 before joinder of issue.[11] There is no doubt that generally discovery and inspection on order may not be had against a person not a party to the action.[12] A technical exception exists, however, where the article or document sought is in the possession of the insurer of the party against whom the application for discovery is made. No strenuous objection to the validity of this exception appears to have been made since *Bearor v. Kapple.*[13] There, defendant opposed plaintiff's motion for discovery of a statement taken from him by defendant's insurer, on the ground that the statement was the exclusive property of the company. The motion was granted, the court holding that

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[10] Dunbar & Sullivan Dredging Co. v. State, 174 Misc. 743, 21 N.Y.S.2d 937 (Ct. Cl. 1940).

[11] Weinstein and Bergman, *New York Procedures To Obtain Information In Civil Litigation,* 32 N.Y.U.L. REV. 1066 (1957).

[12] Rubel Corp. v. Rosoff et al, 251 App. Div. 868, 297 N.Y. Supp. 274 (1937); Bayside-Flushing Gardens, Inc. v. Dalis, 261 App. Div. 831, 24 N.Y.S.2d 880 (1941).

> ". . . the relationship between the defendants and the insurance company is so closely related as to the subject matter of the law suit that as a matter of fact, if not in law, the insurance company is the real and actual defendant, the real party in interest."[14]

It might be argued that sounder authority for this holding exists in the words "possession *or* control", found in the statute itself, but in any event the rule is well settled that discovery and inspection will not be denied solely because the article or document sought is in the possession of a nonparty insurer.[15]

While this comment deals largely with litigation involving individual parties, it should be noted that public and municipal corporations are subject to discovery and inspection, under § 324 as amended in 1945, and foreign corporations, once jurisdiction has been acquired or invoked, are equally within the rule.[16] The state of New York, however, is not subject to an order in the Court of Claims for discovery and inspection under § 324.[17]

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[13] 24 N.Y.S.2d 655 (Sup. Ct. 1940).

[14] *Id.* at 658–59.

[15] See, in addition to *Bearor v. Kapple,* Leone v. Lohmaier, 205 Misc. 467, 128 N.Y.S.2d 618 (Sup. Ct. 1954), torch delivered by plaintiff to his insurer held to be sufficiently in plaintiff's control to warrant discovery and inspection by defendant.

[16] Gemson v. Perreault, 201 App. Div. 649, 194 N.Y. Supp. 618 (1922).

[17] 5 CARMODY-WAIT, DISCOVERY AND INSPECTION § 7 (1953).

In New York negligence litigation it would appear that a large number of applications for discovery and inspection under § 324 are made by plaintiffs seeking copies of statements given by them to defendant's representatives, who are almost invariably insurance company adjustors or investigators. Despite the fact that these documents ordinarily become relevant only when contradicted by testimony upon trial, the sheer number of decided cases leaves no doubt that they are proper subjects of discovery. The earlier cases tended to place them beyond discovery and inspection, unless it appeared that they were obtained through fraud, misrepresentation or duress,[18] or at a time when plaintiff's physical condition was doubtful.[19] No reason is seen why this should not have continued to be the rule, and there is authority for the proposition that the statute was not intended merely to enable the movant to eliminate any conflict between the details of his statement and his testimony upon trial.[20] That this is the real reason for seeking discovery of a statement previously given cannot seriously be doubted, and in the *Sack* case [21] plaintiff's motion was denied where his moving papers showed only that he was not represented by counsel when the statement was taken from him, and that he had forgotten its contents. In opposition is *Swartzman v. Sova,*[22] where the court seemed constrained to grant plaintiff's motion because her affidavits supported her claim that she had no recollection of the statement's contents. There, however, the statement had been taken ten days after plaintiff had retained counsel, and discovery and inspection in such instances should invariably be granted.

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[18] Sack v. All States Holding Corp., 268 App. Div. 793, 49 N.Y.S.2d 148 (1944).

[19] Meehan v. McCloy, 266 App. Div. 706, 40 N.Y.S.2d 207 (1943).

[20] La Maida v. Miledna Realty Corp., 182 Misc. 690, 49 N.Y.S.2d 650 (Sup. Ct. 1944).

[21] Sack v. All States Holding Corp., *supra* note 18.

[22] 11 Misc.2d 691, 175 N.Y.S.2d 342 (Sup. Ct. 1957).

Gradually, the reluctance to allow discovery and inspection of a plaintiff's own statement lessened, and, while there is still some conflict in the various judicial departments, it seems but a matter of time before the rule established by the appellate division in the third department, in *Wilhelm v. Able,*[23] will become universal. There it was held that the previously existing rule in that department should be changed, and that a person or his insurance carrier who takes a statement from a possible plaintiff should furnish the latter with a copy, or, failing that, the plaintiff should be permitted to inspect. This, said the court,

> ". . . in our opinion, will be certain to save time both for the courts and litigants and tend to a more efficient and speedy disposition of cases." [24]

It is obvious that crowded calendars have done much to change the view of our courts with regard to discovery and inspection, but it is at the same time questionable whether under such view the rights of both litigants are equally protected.

The appellate division in the first department has recently announced its adherence to the *Wilhelm* rule, and in *Totoritus v. Stefan,*[25] a case displaying no unusual facts, held that plaintiff was entitled to a copy of a statement taken from him by defendant's insurer.

In the second department, it appears that the appellate division has as yet seen no reason to reverse its holding in the *Sack* case,[26] although the lower courts of that department apparently do not feel bound to follow the decision. In *Herlihy v. Costa* [27] and *Konopka v. La Purka,*[28] motions for discovery and inspection of statements taken from plaintiff were granted. Delay in the disposition of cases was intimated as influencing the decision in the *Konopka* case, although there the court rhetorically asked:

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[23] 1 App. Div.2d 55, 147 N.Y.S.2d 475 (1955).

[24] *Id.* at 57, 147 N.Y.S.2d at 477.

[25] 6 App. Div.2d 123, 175 N.Y.S.2d 802 (1958).

[26] Sack v. All States Holding Corp., *supra* note 18.

[27] 5 Misc.2d 192, 159 N.Y.S.2d 286 (Sup. Ct. 1957).

[28] 11 Misc.2d 895, 172 N.Y.S.2d 330 (Sup. Ct. 1957).

> "If the statement is the true version of the occurrence, how can defendant be harmed if plaintiff's testimony at the trial is consistent with the statement?"[29]

While no authoritative cases in the fourth judicial department have been found, it may be that the trend toward full discovery will not readily find judicial favor there. A recent attempt was made in *Milbyer v. Delaware, L. & W. R.R.*[30] to induce the Onondaga County Supreme Court to follow the *Wilhelm* case, but the point went undecided, the court finding that defendant had not, in fact, taken a statement from plaintiff. It suggested, however, that in regard to a plaintiff's obtaining his own statement, the fourth department might not follow the third, because it had refused to do so in a similar situation involving medical reports.[31]

Thus it now seems apparent that the desire of the judiciary to expedite the disposition of negligence cases and alleviate overburdened calendars has initiated a trend which will virtually eliminate the element of discretion and lead to full discovery and inspection almost as a matter of right, at least where the subject of the application is a statement given by plaintiff to defendant's representatives. No cases have been found in which defendant has sought copies of a statement taken from him by plaintiff's counsel, but it seems reasonable to conclude that discovery should be granted equally in such instances.

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[29] *Id.* at 897, 172 N.Y.S.2d at 332.

[30] 12 Misc.2d 224, 176 N.Y.S.2d 1003 (Sup. Ct. 1958).

[31] See Swiatlowski v. Kasprzyk, 3 App. Div.2d 261, 160 N.Y.S.2d 362 (1957).

Despite the conflict with regard to statements made by plaintiff, the rule is well settled that accident reports made to a defendant by its employees or agents may not be made the subject of discovery and inspection.[32] This has long been the view,[33] and the reasons generally given are that such documents are not evidence within the purview of § 324,[34] and that they might improperly supply the plaintiff with clues as to where evidence might be gathered.[35] Cases on the point are not numerous, and the appellate division in the second department has reaffirmed the rule as late as 1958.[36]

The applicability of § 324 to discovery and inspection of names and addresses of witnesses, or of signed statements given by them, does not appear to have been the subject of much motion practice. This is perhaps due to an awareness that an examination before trial under § 288 CIVIL PRACTICE ACT for the same purpose will normally be denied,[37] and the resulting belief that application for discovery and inspection under § 324 will be dealt with similarly. Although examinations before trial are not within the scope of this comment, it should be noted that widely divergent factors are present when contrasting this remedy with discovery and inspection, and it is not sound to conclude that names, addresses and statements of witnesses are invariably beyond the reach of an application for discovery and inspection on order. Thus in *Poppo v. Long Island RR.,*[38] plaintiff's motion to discover and inspect the names, addresses and statements of defendant's employees who witnessed the accident was granted. *Urbina v. McLain,*[39] however, is strong indication in the first department that the appellate division there will not look favorably upon a motion to discover and inspect a statement given by a witness to the adverse party. There, the statement had been taken by defendant's investigator from plaintiff's eleven year old daughter, not a party to the action. Upon appeal, the order entered at special term granting plaintiff's motion to inspect the statement was unanimously reversed, despite the age of the witness and her close relation to the plaintiff. In an apparent attempt to check the trend toward full discovery, the court concluded that

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[32] TRIPP, A GUIDE TO MOTION PRACTICE 216 (rev. ed. 1949).

[33] Falco v. New York, N.H. & H. R.R., 161 App. Div. 735, 146 N.Y. Supp. 1024 (1914), apparently the first statement of the rule and still followed.

[34] Ehrlich v. New York Cent. R.R., 251 App. Div. 721, 295 N.Y. Supp. 181 (1937), citing and following *Falco;* Raleigh v. City of New York, 264 App. Div. 776, 34 N.Y.S.2d 685 (1942), citing and following *Ehrlich.*

[35] Dunfee v. Bd. of Educ., 141 N.Y.S.2d 633 (Sup. Ct. 1955).

[36] Carlson v. Long Island R.R., 6 App. Div.2d 821, 176 N.Y.S.2d 236 (1958).

[37] Gavin v. New York Contracting Co., 122 App. Div. 643, 107 N.Y. Supp. 272 (1907).

> "Despite the tendency to liberalize pretrial procedures, section 324 of the CIVIL PRACTICE ACT has not yet been interpreted to include the discovery and inspection of a statement by a witness who is otherwise available for interrogation by the party seeking the discovery."[40]

The phrase "otherwise available for interrogation" seems to mark the point of departure between these two cases, for in the *Poppo* case plaintiff's undenied affidavit alleged that the witnesses were inaccessible and unavailable to him, and it was these factors which persuaded the court that in granting discovery it was not contravening the rule of the *Urbina* case. While the *Poppo* case may be sound in part, no good reason is seen why discovery should have been extended beyond the names and addresses of the witnesses, to include their statements. The fact that the witnesses were defendant's employees and would undoubtedly have refused to give a subsequent statement to plaintiff hardly seems sufficient reason for giving the latter the benefit of defendant's investigation and trial preparation.

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[38] 14 Misc.2d 499 (Sup. Ct. 1958).

[39] 4 App. Div.2d 589, 168 N.Y.S.2d 175 (1957).

[40] *Id.* at 590, 168 N.Y.S.2d at 177.

Reports made by attending and examining physicians in personal injury actions have recently become the subject of controversy, where discovery and inspection of them is sought either by application under § 324, or at the time an application is made under § 306 CIVIL PRACTICE ACT for an order directing that plaintiff submit to examination.

In a case of the first category, the appellate division in the second department denied plaintiff's motion to direct the defendant to furnish him with a copy of an examination performed by the defendant's physician.[41] In the face of a showing that the examination was with plaintiff's consent, and without any agreement that he receive a copy, the court saw no reason to grant the application. A later decision of the same court, however, suggests either that the *Andrews* case is no longer law in the second department, or that it will be restricted in the future to identical fact situations. In *Mansoor v. Simon*,[42] defendant appealed from an order granting his motion to examine the plaintiff under § 306 CIVIL PRACTICE ACT, upon the condition that plaintiff be furnished with a copy of the report. Defendant contended upon appeal that if the condition be complied with, plaintiff should furnish in return copies of his own attending physician's reports. This contention was rejected, and the order, insofar as appealed from, was affirmed. In view of the *Mansoor* case, plaintiffs in the second department will undoubtedly refuse to submit voluntarily to an examination and risk being later brought within the facts of the *Andrews* decision, although if they do submit they will be careful to stipulate that copies of the report be furnished them.

The appellate division in the first department, although it has adopted a rule requiring plaintiffs to submit to a physical examination before placing their cases on the calendar,[43] still does not seem disposed to grant them a copy of the report. The rule makes no provision for exchange, and *Feinberg v. Fairmont Holding Corp.*[44] is apparently still law in the first department. There, it was held that x-ray photographs may be taken in connection with a physical examination, but they are no more open to inspection than are reports of the examination itself. Physical examinations, said the court,

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[41] Andrews v. Ghikas, 278 App. Div. 658, 102 N.Y.S.2d 796 (1951).

[42] 5 App. Div.2d 845, 171 N.Y.S.2d 543 (1958).

> ". . . are permitted by section 306 of the CIVIL PRACTICE ACT for the purpose of enabling defendants to ascertain the nature and extent of the injuries claimed to have been sustained and not to afford plaintiffs a means of obtaining evidence at the expense of defendants. Reports of examining physicians based upon such examinations are not made available to plaintiffs." [45]

It should be noted, however, that in departments granting discovery and inspection of examining physician's reports, x-ray photographs taken in connection with the examination are equally discoverable.[46]

The appellate division in the third department has for some time felt that a plaintiff ordered to submit to a physical examination should be furnished with a copy of the report.[47] In *Rooney v. Colson*,[48] decided in 1957, that court went one step further and laid down a rule requiring complete mutuality of exchange. Special term had granted defendant's motion for a physical examination, but denied plaintiff's request that he be furnished with a copy. On appeal, the order was modified, the court holding that

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[43] N.Y. Co. Sup. Ct. Rules, Trial Term Rule XII; Bronx Co. Sup. Ct. Rules, Trial Term Rule XXI.

[44] 272 App. Div. 101, 69 N.Y.S.2d 414 (1947).

[45] *Id.* at 102, 69 N.Y.S.2d at 415. *But cf.* Totoritus v. Stefan, 10 Misc.2d 881, 173 N.Y.S.2d 411 (Sup. Ct.), *aff'd*, 6 App. Div.2d 123, 175 N.Y.S.2d 802 (1958), holding, in part, that plaintiff be furnished copies of the report of an examination performed by defendant's physician. This portion of the order was apparently appealed from and affirmed, as was that portion directing that plaintiff be furnished a copy of his own statement, although the point is not discussed in the opinion of the appellate division, and no mention of the *Feinberg* case is made in either court.

[46] Miller v. New England Mut. Life Ins. Co., 14 N.Y.S.2d 129 (Sup. Ct. 1939).

[47] Del Ra v. Vaughan, 2 App. Div.2d 156, 154 N.Y.S.2d 336 (1956).

[48] 3 App. Div.2d 410, 161 N.Y.S.2d 445 (1957).

> ". . . in accordance with the modern trend toward full disclosure on both sides, the plaintiff should be required to give to the defendant a copy of the report of the examination by his physician or physicians, as a condition of his obtaining a copy of the report by the defendant's examining physician."[49]

Current policy in the fourth judicial department with reference to the exchange of medical information does not appear to be so liberal, and in *Swiatlowski v. Kasprzyk*[50] the appellate division in that department expressed in clear terms what it felt to be the law. Plaintiff, before commencement of the action, had voluntarily submitted to an examination by defendant's physician, and defendant's motion after suit had been begun for a further examination was granted,[51] the order directing that plaintiff be furnished with a copy of the report. Upon appeal, the latter portion of the order was reversed, and it was held that the right to examine under § 306 CIVIL PRACTICE ACT, once established, should not be burdened with the requirement that a copy of the report be given to plaintiff. There are no appellate decisions on the point subsequent to the *Swiatlowski* case, although in *Milbyer v. Delaware, L. & W. R.R.*[52] that decision was distinguished and plaintiff's motion for discovery and inspection of the reports of defendant's physician, by whom he had been treated following the accident, was granted. The action was one begun under the FELA, and the *Swiatlowski* case was not thought to be controlling because the physician who had treated plaintiff following the accident was actually, although paid by defendant, plaintiff's attending physician for the injuries in question.

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[49] *Id.* at 412, 161 N.Y.S.2d at 447.

[50] 3 App. Div.2d 261, 160 N.Y.S.2d 362 (1957).

[51] That an examination before the commencement of an action is neither "an examination in the action" nor a waiver of the right thereto, see Cronin v. Anderson, 226 App. Div. 691, 233 N.Y. Supp. 476 (1929).

[52] 12 Misc.2d 224, 176 N.Y.S.2d 1003 (Sup. Ct. 1958).

The most well-reasoned statement of the belief that disclosure to plaintiff of defendant's medical reports should be denied is found in *Mizak v. Carborundum Co.,*[53] where Judge Pound stated that

> "Plaintiff's physicians . . . do not disclose their knowledge or information to the defendant without the plaintiff's consent. A defendant in a negligence case may not be compelled to disclose before trial what the physical examination of plaintiff . . . reveals, any more than it may be compelled to disclose what it expects to prove by its other witnesses. Equality in this respect is fair. The real purpose of the examination is to discover to defendant 'the nature and extent of the injuries complained of'."[54]

It cannot be denied that the value of defendant's examining physician as an expert witness upon trial is, at the very least, greatly diminished when a copy of his report has been ordered furnished to plaintiff before trial. Nevertheless, the clear trend is toward discovery and inspection of such reports, and if this is to be the law then cases requiring complete mutuality of exchange are its fairest expression. In accord with this belief, various legislative proposals are presently pending in New York, looking to the possibility of requiring that plaintiffs who submit to examination voluntarily or pursuant to order be furnished with a copy of the report, and it is proposed that, as a condition to their obtaining such copy, plaintiffs be required to furnish the defendant with their own physician's reports.

It must be noted that the scope of discovery and inspection under § 324 is not limited merely to the examination of papers, records and other documentary material, nor is the mode of inspection limited to mechanical copying. Thus discovery and inspection has been permitted of a rope[55] and tow chain,[56] the breaking of which allegedly caused the accident, as well as of fragments of glass alleged to have caused personal injuries[57] and a defective torch claimed to have caused property damage.[58] It would seem that, with reference to the discovery and inspection of articles, the same general requirements applicable to documentary material prevail. The statute expressly permits the taking of photographs in a proper case, although it has been held that it was not the legislative intent to permit the taking of motion pictures.[59] Under the liberal construction of § 324, tests and analyses have been permitted,[60] although the adverse party or his representative should be present when they are made.[61] Analytical tests which would destroy the value of the article are forbidden, unless it is possible to take a sample.[62]

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[53] 75 Misc. 205, 132 N.Y. Supp. 1104 (Sup. Ct.), *aff'd,* 151 App. Div. 899, 135 N.Y. Supp. 1128 (1912).

[54] *Id.* at 208, 132 N.Y. Supp. at 1106.

Privileged papers may not be made the subject of discovery and inspection, unless the privilege has been waived.[63] An exception exists, however, where disclosure will not violate the privilege. Thus in *Matter of Warrington*,[64] the committee of a patient was permitted to discover and inspect hospital records, on the theory that it was acting for the patient. The work product of an attorney is not discoverable,[65] although the rule does not apply where the material sought to be discovered was at one time a work product but subsequently became non-privileged. In *Roach v. City of Albany*,[66] plaintiff was granted discovery and inspection of a photograph which had been placed in evidence at an examination conducted prior to the commencement of her action.

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[55] Dugan v. American Transfer Co., 160 App. Div. 11, 145 N.Y. Supp. 31 (1913).

[56] Scully v. Farragut Refrigeration Co., 207 Misc. 798, 140 N.Y.S.2d 614 (Sup. Ct. 1955).

[57] Latorre v. Pepsi Cola Met. Bottling Co., 204 Misc. 184, 125 N.Y.S.2d 329 (Sup. Ct. 1953).

[58] Leone v. Lohmaier, 205 Misc. 467, 128 N.Y.S.2d 618 (Sup. Ct. 1954).

[59] Levine v. Pepsi Cola Met. Bottling Co., 279 App. Div. 869, 110 N.Y.S.2d 98 (1952).

[60] See, *e.g.,* Reiss v. Kirkman & Son, Inc., 242 App. Div. 77, 273 N.Y. Supp. 7 (1934), ordering plaintiff to deliver for analysis samples of a cleaning material manufactured by defendant and alleged to have caused personal injuries.

[61] Jerry & Herbert Lehmann, Inc. v. Turtle Bros., Inc., 149 Misc. 744, 267 N.Y. Supp. 785. (Sup. Ct. 1933).

[62] Scully v. Farragut Refrigeration Co., *supra* note 56.

[63] Bloodgood v. Lynch, 293 N.Y. 308, 56 N.E.2d 118 (1944).

The FEDERAL RULES OF CIVIL PROCEDURE, rules 26 to 37, provide the means for the taking of testimony, the discovery and inspection of documentary evidence and other tangibles and the examination of property and persons, before the trial of any action in a federal court. Some attempt will be made here to illustrate the contrast between them and the application of § 324 NEW YORK CIVIL PRACTICE ACT.

Under federal rule 26, any party after joinder of issue may take the deposition of ''any person'', including those not parties to the litigation. The deposition may be with reference to

> ''. . . any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts.'' [67]

It is specified that the fact that the testimony adduced will be inadmissible at the trial is not ground for objection, provided it is reasonably calculated to lead to the discovery of admissible evidence.

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[64] 303 N.Y. 129, 100 N.E.2d 170 (1951).

[65] Marco v. Sachs, 109 N.Y.S.2d 224 (Sup. Ct. 1951).

[66] 282 App. Div. 807, 122 N.Y.S.2d 437 (1953).

[67] FED. R. CIV. P. 26(b).

Early decisions emphasize the liberal manner in which the federal rules must be construed. In *Nichols v. Sanborn Co.,*[68] it was stated that

> ''Under the present rule discovery may be had now to ascertain facts relating not only to the party's own case but to his adversary's also.''[69]

In accord with the rule of liberality, the cry of ''fishing expedition,'' which may still be raised in New York,[70] is of no avail in the federal courts, where the rules as to admissibility of evidence sought to be discovered simply do not govern. As was said in *Lewis v. United Airlines Corp.,*[71]

> ''. . . to the extent that the examination develops useful information it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible.''[72]

It should also be noted that the attendance of witnesses may be compelled at an examination held pursuant to rule 26, and discovery of books and documents obtained by means of a *subpoena duces tecum.* Thus rule 26 is sufficiently broad to permit discovery of any relevant matter not privileged, whether the purpose of the discovery be to narrow the issues, obtain evidence for use upon trial or to determine where such evidence may be found.

Federal rule 33 provides a somewhat narrower method of discovery, and permits written interrogatories to be served upon and answered by an adverse party. The statement has been made that rule 33 was not intended as an alternative method of discovery,[73] and yet it has been put to that use. While, as a practical matter, written interrogatories completed after careful thought and advice of counsel are probably not effective to secure information on disputed issues, they nevertheless serve as a method of obtaining information regarding documentary evidence, or the names and addresses of witnesses. After such information has been obtained, the depositions of the witnesses may be taken under rule 26, or discovery of the documentay evidence sought under rule 34. The courts have held from the first that the scope of examination by interrogatories is equal to that permitted under rule 26.[74] Interrogatories may thus seek information leading to the procurement of evidence, and the rules regarding admissibility are no more applicable to rule 33 than to rule 26.[75]

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[68] 24 F. Supp. 908 (D.C. Mass. 1938).

[69] *Id.* at 910.

[70] See, *e.g.,* Haffenberg v. Wendling, 271 App. Div. 1057, 69 N.Y.S.2d 546 (1947), stating that discovery and inspection will not be granted merely because the documents sought may supply a clue as to where evidence may be gathered.

[71] 27 F. Supp. 946 (D.C. Conn. 1939).

[72] *Id.* at 947.

Federal rule 34, relating to the "discovery and production of documents or things for inspection, copying or photographing" serves the same purpose as does § 324 CIVIL PRACTICE ACT for actions pending in New York. Prior to the 1946 amendment to rule 34, which deleted the words "material to any matter involved in the action" and added, *inter alia,* the words "relating to any of the matters within the scope of the examination permitted by Rule 26(b)," it was thought that an order might issue only with respect to a document containing material evidence, and federal courts so held.[76] Now, however, the reference to the scope of the examination permitted by rule 26 can only mean that it is difficult to imagine any document which, in a properly presented situation, cannot be discovered under rule 34, subject to the required showing of good cause. In most instances, good cause may perhaps be said to impose a greater burden on the movant than does the discretionary barrier present in New York discovery and inspection, although it is difficult to determine precisely what constitutes good cause. Obviously, it is not shown when the material sought can be obtained through means other than disclosure, but the federal courts are not in accord as to other limitations of the requirement. It was held in one instance that good cause means necessity or something closely akin to it, in order to avoid undue prejudice,[77] while other courts have felt that what constitutes good cause has no general answer and depends on practical considerations and the facts of each case.[78]

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[73] Note, 28 VA. L. REV. 348, 358 (1942).

[74] Nichols v. Sanborn Co., *supra* note 69.

[75] Fox v. Fisher, 39 F. Supp. 878 (E.D. Tenn. 1941).

[76] See, *e.g.,* Kenealy v. Texas Co., 29 F. Supp. 502 (S.D. N.Y. 1939).

Once good cause has been established, however, it should not be thought that rule 34 permits a roving inquiry, for a request for ''all documents'' within the possession of an adverse party and relating to the matter at hand is not specific enough to meet the added requirement of rule 34 that the documents sought must be ''designated.'' Many of the earlier cases appeared to follow the ''here it is'' interpretation placed upon the designation requirement, and in *United States v. American Optical Co.*[79] it was held that the designation or enumeration must be sufficiently precise to enable the adverse party to go to his files and, without any hesitation or prolonged search, produce the document requested. Now, however, the courts are more liberal and it would seem that sufficient particularity is shown where the documents are merely identified by categories, which are themselves defined in a reasonably specific manner.[80]

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[77] Helverson v. J.J. Newberry Co., 16 F.R.D. 330 (W.D. Mo. 1954).

[78] De Gaetano v. Frank A. Clendaniel, Inc., 15 F.R.D. 114 (D.C. Del. 1953); Tobin v. Gibe, 13 F.R.D. 16 (D.C. Del. 1952).

[79] 2 F.R.D. 534 (S.D. N.Y. 1942).

[80] See Jensen v. Boston Insurance Co., 20 F.R.D. 619 (N.D. Cal. 1957).

Bearing in mind the requirements that good cause be shown and that the documents sought be sufficiently designated, it remains to determine what particular documents or articles may be made the subject of disclosure under rule 34. It seems that the generally prevailing New York rule, that accident reports made to the defendant by its employees are not subject to discovery and inspection, does not obtain in federal practice. In numerous cases plaintiff has been held entitled to the production of such reports made in "the regular course of investigation," and in *Flores v. Matson Navigation Co.,*[81] defendant was required to produce all reports filed with it relating to the accident in question. Some distinction appears to be made between reports and statements made "in the regular course of investigation," and those made in preparation for litigation. The former are almost uniformly discoverable, while the latter are generally protected from disclosure, either as part of an attorney's work product[82] or simply upon the theory that a party ought not to obtain by disclosure the results of his adversary's trial preparation.[83]

The rule with respect to disclosure of statements of witnesses made to the adverse party appears quite rigid, and the cases indicate that a strong showing of good cause will be required before copies of such statements may be obtained under rule 34. Thus in *Hilton v. Contiship Corp.*[84] it was held that a defendant would not be required to produce copies of such statements unless it could be shown, for example, that the witnesses were unavailable to the moving party. As a practical matter, however, the stringency of the rule is lessened by the fact that names and addresses of witnesses may ordinarily be obtained by written interrogatories served under rule 33, after which their attendance may be compelled, and their depositions taken, at an examination conducted pursuant to rule 26.

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[81] 12 F.R.D. 262 (S.D. N.Y. 1951).

[82] Thompson v. Hoitsma, 19 F.R.D. 112 (D.C. N.J. 1956); *cf.* Scourtes v. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953), holding that statements which contain the impressions and observations of witnesses, and not those of counsel, are not part of the latter's work product.

[83] Colonial Airlines v. Janas, 13 F.R.D. 199 (S.D. N.Y. 1952).

[84] 16 F.R.D. 453 (S.D. N.Y. 1954).

No discussion of the federal rules of disclosure would be complete without some mention of the landmark case in the field. In *Hickman v. Taylor,*[85] an action brought under the Jones Act, plaintiff filed numerous written interrogatories, including one which requested defendants to indicate whether statements of any crew members of the vessels involved had been taken, and, if so, to attach copies or summaries to the interrogatories. Defendants objected upon the ground that plaintiff sought privileged matter obtained in preparation for litigation, but this contention was in part denied by the district court,[86] which directed that defendants' counsel submit his memoranda to the court, which would separate and disclose those statements of fact which were not mental impressions, theories or other collateral matter. The order was not complied with, and a finding of criminal contempt was entered. Upon appeal, the court of appeals for the third circuit reversed the district court,[87] holding that the statements called for were privileged. On petition for *certiorari,* the Supreme Court affirmed the decision of the circuit court, although its reasoning differed sharply. Defendants' contention that the matter sought was privileged was summarily rejected, the Court holding only that disclosure should not have been granted because plaintiff had failed to show necessity. The scope of the *Hickman* decision then, is that information regarding facts of the case, and witnesses' statements, which have been obtained by the adverse party's *attorney* in anticipation of litigation are neither privileged nor exempt from disclosure, but an exceptional showing of good cause must be made before disclosure of these materials will be granted. Thus where the material sought has been obtained by a claim agent or investigator, and despite the fact that such investigator may himself be an attorney, the limitations of the *Hickman* decision should not apply and its prohibitions against invasion of the files and mental impressions of an attorney are not in point.

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[85] 329 U.S. 495 (1947).

[86] Hickman v. Taylor, 4 F.R.D. 479 (E.D. Pa. 1945).

[87] 153 F.2d 212 (3d Cir. 1945).

The right of a party to obtain through disclosure his own statement, taken from him by defendant or his insurer, was not involved in *Hickman v. Taylor,* and federal courts are not in accord on this point. In *Hayman v. Pullman Co.,*[88] defendant was required to furnish plaintiff with a copy of her own statement, the court indicating that it could see no possible prejudice to defendant's rights. In *Safeway Stores, Inc. v. Reynolds,*[89] however, the opposite conclusion was reached and an order under rule 34 requiring defendant to produce a copy of plaintiff's statement was reversed, the court holding that to deny disclosure would work no undue hardship on plaintiff. In this respect at least, it would appear that the more rigid federal decisions are at the opposite pole from the great majority of New York cases, which have allowed discovery and inspection of a party's own statement almost as a matter of right. In view of the liberality in other areas, and particularly those decisions allowing disclosure of witnesses' statements upon a reasonable showing of good cause, no reason is seen why a party may not, under federal rules, obtain disclosure in all cases of his own statement.

Federal rule 35 is analogous to § 306 NEW YORK CIVIL PRACTICE ACT, in that both authorize the court to direct a plaintiff to submit to a physical examination. Rule 35, however, is not restricted to an action for personal injuries,[90] and permits a physical or mental examination in any action in which the physical or mental condition of a party is in controversy. The New York conflict with respect to the exchange of information obtained after an examination on order is eliminated in federal practice by rule 35 (b)(1), which requires that the party examined be furnished, on request, with a copy of the report, and that he deliver to the examining party in return copies of his own examining physician's reports.

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[88] 8 F.R.D. 238 (N.D. Ohio 1948).

[89] 176 F.2d 476 (App. D.C. 1949).

In summary, it seems it cannot be said that the scope of disclosure in negligence litigation under federal rules is in all aspects broader than that permitted under § 324 New York Civil Practice Act. Federal rules 26 and 34, when read together as they must be, tend to negate this conclusion, but support is furnished by the decided cases. Thus while it is true that accident reports made to a defendant by its employees, ordinarily beyond the reach of an application under § 324, are proper subjects for disclosure under rule 34, the converse is generally the case where the document sought is a party's own statement. The majority of New York courts grant applications to discover and inspect such statements readily, while many federal courts are far more reluctant to do so. The situation with regard to the disclosure of witnesses' statements seems in the average case to be very nearly equal in both federal and New York practice, each requiring, the former by express statutory language and the latter by judicial construction that good cause be shown to justify the granting of an application for disclosure. One point of departure undoubtedly is found in the case of a witness who, while available, refuses to give a second statement. In federal practice under rule

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[90] Beach v. Beach, 114 F.2d 479 (App. D.C. 1940); *contra,* Wadlow v. Humberd, 27 F.Supp. 210 (W.D. Mo. 1939), expressly disapproved in *Beach v. Beach* and believed to be a far stricter interpretation of rule 35 than was intended.

34, disclosure of his statement, provided it contained information not otherwise available, would undoubtedly be permitted, while in New York it is probable that such refusal alone would not justify a departure from the established rule.

In conclusion, it remains to point out that proposed legislative changes in New York will, if adopted, go far toward eliminating the conflicts and inconsistencies present in New York discovery and inspection. On February 1, 1957 the ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE submitted its first preliminary report to the Governor and Legislature. The proposed changes in discovery and inspection contained in the first report are aimed at the widest possible discovery, and this is exemplified by rule 34.1(a), which states:

> ''Full disclosure required. Except as otherwise specifically provided in these rules, there shall be full disclosure before trial of all relevant evidence and all information reasonably calculated to lead to relevant evidence.''

Adoption of this rule would abolish the present distinction between witnesses and parties, as well as that between admissible evidence and that which may lead to admissible evidence. The exception of privileged matter is retained, and rule 34(c) exempts from disclosure an attorney's work product, including expert opinions and material ''created by or for a party or his agent in preparation for litigation.'' In establishing this rule, the Committee has adopted the rule laid down in *Hickman v. Taylor* by qualifying the exemption and permitting disclosure if it is found that denial would work undue hardship. The Committee has rejected as impractical the attempt to distinguish between attorneys regularly employed as investigators and those assigned to a particular matter after litigation has been begun or threatened, and in so doing has gone beyond the federal cases, which have, within the *Hickman* rule, granted disclosure where the material was secured by someone other than the party's attorney, even though that person be himself an attorney. In addition, the proposed rules would exempt material prepared by a layman primarily for use by attorneys in litigation. Rule 34(d) expressly provides that a party may obtain a copy of his own statement, thus eliminating the present conflict among some of the judicial departments.

Under proposed rule 34.2, disclosure may be had by

> ". . . depositions upon oral or written questions, interrogatories, discovery and inspection of documents or property, physical and mental examination of persons, and requests for admission."

Subdivision (b) of rule 34.2 provides that disclosure shall be obtained on stipulation or notice without leave of the court, and thus goes beyond the New York and federal rules by making discovery obtainable in every instance without application and order by the court. It was felt by the Committee that this would enable the litigants rather than the courts to maintain maximum control of the suit, although further rules give the court broad power to prevent abuse.[91] Proposed rule 34.2(b) broadens existing provisions by permitting disclosure before an action is commenced, to aid in bringing an action or to preserve information, although in such instance disclosure is permissible only upon order of the court. Rule 34.2(d) also makes provision for disclosure during and after the trial, and pending appeal, by order of the trial court on notice.

Rule 34.6(a) provides, *inter alia,* that after commencement of an action any party may take the testimony of any person by deposition upon oral or written questions. This rule, based in part upon federal rule 26(a), also accords to the defendant normal priority, and enables him to obtain the first examination, although by proposed rule 34.3(a), the court is given ample discretion to vary this priority as well as to issue protective orders affecting the use of any discovery device.

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[91] Proposed rules 34.3, 34.4, 34.24, 34.25.

By proposed rule 34.20, patterned after federal rule 34, any party after commencement of an action may by notice seek to inspect, copy, test or photograph designated documents or things in the possession, custody or control of the party served with notice. Motion pictures are specifically authorized, to overcome the effect of those decisions denying this extension of present § 324 CIVIL PRACTICE ACT.

Under rule 34.21(a) a physical, mental or blood examination may be had on notice, and the scope of the examination is greatly broadened to include not only a party, but the agent, employee or person in the legal custody or control of a party, whose condition is in controversy. By rule 34.21(d), complete mutuality of exchange of physical reports is required, provided, however, that the action is one for personal injuries and further stipulating that if the person examined is not a party he may not request a copy of the report, since he would not be in position to control the litigation.

Discussion with regard to the effect of the proposed rules can at this time be only speculative. It is felt, however, that certain aspects of New York discovery and inspection are in need of statutory codification, and it is hoped that the proposed rules when finally presented to the Legislature will meet with acceptance and become enacted into law.

GEORGE F. ROESCH III

Injunction of Crimes Without Statutory Authority

There has developed, of late, a tendency of increasing proportions to circumvent the formerly well established rule that equity will not undertake the enforcement of the criminal law. Indeed, it is doubtful that Lord Eldon's dictum, "I have no jurisdiction to prevent the commission of crimes . . .,"[1] could be said to be applicable in any but the most remote sense to the judge administering equitable relief in New York at the present time. The evolution of this growing inroad on equity's refusal to take upon itself[2] matters within the jurisdiction of the criminal law has presented many difficult questions with respect to fundamental reasons for the inception and continued existence of equity's position.

Among the recent cases which represent the application of the New York Court of Appeals decision in *People ex rel. Bennett v. Laman,*[3] and indicative of the present construction of the rule, is the supreme court decision, rendered while sitting at special and trial term in New York County, in *City of New York v. Windsor Madison Corporation.*[4] In the latter case, the defendant, an operator of a haberdashery in New York City, had applied to the Department of Licenses of the City of New York for a license to conduct a thirty-day forced-out-of-business sale, pursuant to that city's administrative code,[5] and the application and the ensuing appeal had been denied. Notwithstanding prosecution under the penal provisions of the code, the defendant persisted in violating it by publishing in newspapers and by posting placards that a forced-out-of-business sale was in progress. Finding that approximately seventy-six summonses had been served upon the defendant for violations of the code, with a fine having been assessed in some cases and a dismissal of the summons in others, the court issued an injunction restraining the defendant from further violation of the statute.

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[1] Gee v. Pritchard, 2 Swanst. 402, 413 (Chancery 1818). Lord Eldon's statement is generally treated as the standard exposition of the reluctance of the chancellors to interfere with criminal matters. 1 Holdsworth, A History of English Law 406 (7th ed. rev. 1956).

[2] Though not within the scope of this comment, reference may be had, on the subject of legislative provision of injunctive remedies, with particular reference to New York and Massachusetts statutes, in Note, 45 Harv. L.Rev. 1096 (1932).

[3] 277 N.Y. 368, 14 N.E.2d 439 (1938).

[4] 14 Misc.2d 674, 179 N.Y.S.2d 734 (Sup.Ct. 1958).

The problems encountered in such a decision have been vexing to courts of equity throughout most of their history. From an early point in its history, the English court of chancery issued injunctions to restrain the commission of certain criminal acts.[6] As the need for the enforcement of the criminal law by the chancellors, in the interests of the public peace, diminished with the increasing stability of the English government, their criminal jurisdiction fell off, until by the end of the 15th century, it had ceased entirely.[7] The chancellor's criminal jurisdiction was unpopular in the country, and this early unpopularity has been blamed as at least a contributing cause of the opposition of the Commons to equity jurisdiction and the consequent hampering of its entire civil jurisdiction.[8] Therefore, when this unsettled condition ceased to exist, the rule became established, as it is now, that equity would not interfere by the issuance of an injunction to prevent the commission of crimes, as it would not exercise its powers for the purpose of enforcing the criminal laws by restraining criminal acts.[9]

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[5] NEW YORK CITY, ADMINISTRATIVE CODE § B32–205.0.

[6] 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 405, 406 (7th ed. rev. 1956).

[7] See Mack, *The Revival of Criminal Equity,* 16 HARV.L.REV. 390, 391 (1903).

[8] *Id.* at 391–392. But see PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 187–188 (5th ed. 1956).

Classically, equity's primary function is the protection of property interests; the enforcement of the criminal law is not within the purview of equitable relief. Thus, an injunction will not issue to restrain an act merely criminal, but if property rights are endangered, the criminality of the act will not prevent an injunction from issuing.[10] Inherent in this assumption of jurisdiction is the court's power to enjoin the act complained of, notwithstanding the fact that it has been denominated a crime.

The criminality of the act, then, will not necessarily preclude an injunction from issuing.[11] However, to construe a legislative enactment of a criminal statute as the designation of a public nuisance capable of supporting, by virtue of its criminality alone, an equitable action for an injunction,[12] is unjustifiably contrary to the fundamental proposition that equity does not undertake the enforcement of the criminal law. A more conservative point of view, which observes more closely equity's position in relation to the criminal law, is the position that equity might enjoin an act for which a criminal penalty is provided in certain situations, but that, in the absence of the necessary proprietary interest, the criminal statute alone will not authorize equity to issue an injunction.[13]

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[9] 4 POMEROY, EQUITY JURISDICTION 949 (5th ed. 1941).

[10] *Ibid.*

[11] See, *e.g.,* People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897) (operation of a mill on a river stocked with fish enjoined, though such operation a misdemeanor); Cella v. People, 112 Ill.App. 376 (1904) (injunction to restrain the maintenance of a pool-room granted); State v. Ohio Oil Co., 150 Ind. 21, 49 N.E. 809 (1898) (allowance of natural gas to escape contrary to statute enjoined). *Cf.* Dean v. State, 151 Ga. 371, 106 S.E. 792 (1921) (injunction to restrain the unlicensed practice of medicine denied); Cope v. District Fair Ass'n, 99 Ill. 489 (1881) (injunction denied in stockholder's action to restrain company from permitting gamblers to congregate on company's ground for pecuniary reward); State v. O'Leary, 155 Ind. 526, 58 N.E. 703 (1900) (conducting of remotely located gambling house not enjoinable); State v. Crawford, 28 Kan. 726, 42 Am.Rep. 182 (1882) (conducting an illegal saloon not enjoinable, because remedy at law deemed adequate); State v. Ehrlick, 65 W.Va. 700, 64 S.E. 935 (1909) (injunction restraining conducting of a "turf exchange" denied).

[12] See City of New Orleans v. Liberty Shop, 157 La. 26, 101 So. 798 (1924).

Of course, if the equity courts are not to be instruments for the prosecution of crimes, the rule must apply to an action instituted by the state or one of its instrumentalities as well as to the individual seeking to enjoin acts of a criminal nature. It has been observed by one court [14] that the doctrine that the King could take his choice in which of his courts he would bring his action has been asserted in only one instance; [15] and, if this choice had been allowed, the courts of chancery would have been turned into criminal courts, particularly during the reign of the Stuarts.

Before proceeding any further, a statement of the rationale of equity's reluctance to intercede in criminal matters would seem to be in order. Pervading the whole subject of equitable jurisdiction is the theory of the extraordinary nature of equitable remedies, and, of course, this applies to the injunction of crimes as well as to the other phases of equitable relief. That the injunction is regarded as the strong arm of equity has seemed to add to the persuasiveness of this argument. At the very outset, then, it must be considered that, criminal matters being peculiarly within the realm of the criminal courts, the remedy there is generally deemed adequate.[16]

Also fundamental, and perhaps foremost in the minds of Anglo-American lawyers and judges, is the summary nature of the equitable remedy, with the consequent dispensation of the constitutional safeguards in criminal trials. Treated most often, in this respect, is the forfeiture of the constitutional right to trial by jury.[17] Moreover, the circumvention of all of the constitutional and statutory safeguards can be easily made if the remedy is indiscriminately administered.

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[13] *Compare* Dean v. State, *op. cit. supra* at note 11, *with* State v. Anderson, 6 Tenn.C.C.A. 1 (1915).

[14] State v. Uhrig, 14 Mo.App. 413 (1883).

[15] Attorney General *ex rel.* Blake v. Galway, 1 Malloy (Ir.) 95 (1828).

[16] 4 POMEROY, *op. cit. supra* at 949–950.

Not so commonly mentioned, but present as a consideration, nonetheless, is the lack of likelihood that an injunction will be effective where the criminal law is not.[18] As a matter of fact, the courts quite generally treat the injunction as the infallible method for enforcing adherence to legislative mandates, failing to realize that it too will, in all probability, prove to be ineffective. Its summary use may provide, in certain instances, a remedy where the slower and less certain criminal procedure is incapable of affording quick relief. Even on the assumption that this is true, however, this position is hardly justifiable as a means for avoiding constitutional and statutory limitations.

In denying an injunction, the courts frequently use the argument that the adequacy of the criminal remedy is the concern of the legislature and not within the province of the judiciary.[19] Undeniably, this position is inextricably intermeshed with all of the foregoing arguments for denial of injunctive relief. It strikes hard at those decisions which find the existence of a proprietary interest solely in the legislative denomination of certain acts as crimes. To one point of view, the injunction is merely a supplemental remedy, carrying out the legislative policy as manifested in the penal statutes; to the other, it is an usurpation of the legislative function, disregarding the limits of the judicial function and the remedial provisions of the criminal law as enacted by the legislature.

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[17] Ballantine, *Expansion of Criminal Equity Jurisdiction,* 98 CENTRAL L.J. 5 (1925), Note, 13 CAL.L.REV. 63 (1924); Caldwell, *Injunctions Against Crime,* 26 ILL.L.REV. 259 (1931). It has been argued that the constitutional and procedural protections should not be used to deprive equity of a supplemental capacity in criminal matters incapable of solution by the criminal law. Leflar, *Equitable Prevention of Public Wrongs,* 14 TEX.L.REV. 427 (1936). The reasoning seems specious, however, as it assumes the inadequacy of the criminal law to attain the desired results.

[18] Ballantine, *op. cit. supra* at 65–66.

[19] Dunbar, *Government by Injunction,* 13 L.Q.REV. 347 (1897). See also, Gregory, *Government by Injunction,* 11 HARV.L.REV. 487 (1898); Mahon, *Government by Injunction,* 52 W.VA.L.REV. 217 (1950).

In one sense, both points of view fail to supply an answer which sufficiently encompasses the problem: they both impliedly exclude valid elements in the other. It is true that the civil jurisdiction of the court is not extinguished by a concurrent criminal remedy, and, in the area of public nuisance particularly, legislative policy, as manifested by criminal statutes, may afford valuable criteria for the courts' use. Nevertheless, equity should not be turned from civil to criminal jurisdiction in derogation of the limits of the criminal law.[20]

Always in the background in this problem, and, more often than not, the reason for divergent results is the difficulty in ascertaining just what interests or rights have that magical quality that the courts ascribe as being proprietary in nature.[21] Obviously, a state, or subdivision thereof, as well as an individual, has property rights of its own, or rights held in trust for the public, the protection of which may be provided by equitable relief. Accordingly, the absence of the involvement of property rights was the basis for the denial of an injunction in the leading New York case of *Attorney General v. Utica Insurance Company.*[22] There, in an action by an attorney general to restrain certain persons from carrying on business in violation of the banking laws, it was said that a charge of a criminal nature not affecting property rights was not the proper subject for the exercise of equity's power to issue an injunction.[23]

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[20] Professors Hart and Sacks state the problem tersely by saying: "To what lengths of intellectual nonsense will courts go to pass the buck to the legislature and avoid taking an open and honest responsibility of their own for the growth of the law?

"Is it not plain that the problem, at least in the absence of express treatment by the legislature, is essentially one of remedial policy making by the courts? The legislature fixes primary policy when it declares certain conduct to be forbidden. The court has then to decide whether, consistently with the general law of remedies and its underlying principles and policies, a civil remedy should be provided or should not be." HART AND SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 448 (tentative edition 1958).

[21] Blackstone noted well the operation of the property interest in this problem by saying: "And here I must premise that the law gives no *private*

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remedy for anything but a *private* wrong. Therefore, no *action* lies for a public or common nuisance, but an indictment only: because the damage being common to *all* the King's subjects, no *one* can assign his particular proportion of it: or if he could it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person natural or corporate, can have an action for a public nuisance, or punish it; but only the King in his public capacity of supreme governor, and *paterfamilias* of the kingdom. . . . Yet this rule admits of one exception: where a private person suffered some extraordinary damage, beyond the rest of the King's subjects, by a public nuisance: in which case he shall have a private satisfaction by action." 3 BLACKSTONE, COMMENTARIES *220.

[22] 2 Johns. Ch. 371 (N.Y. 1817). *Cf. In re* Debs, 158 U.S. 564 (1895), where the Court (per Brewer, J.), in a manner which is often overlooked, stated: "Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court . . . but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accomplished by or are themselves violations of the criminal law." *Id.* at 593.

[23] Chancellor Kent's statement on the characteristic of proprietary interests in *Attorney General v. Utica Insurance Co., supra,* was to this effect: "I know that the court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a Court of equity to interfere at all, and much less preliminarily, by injunction, to put down a *public* nuisance which did not violate the rights of property, but only contravened the general policy." *Id.* at pp. 379–380.

The development of the rule from this point in the New York courts followed, for some time, a fairly consistent pattern. In *City of Hudson v. Thorne*,[24] the court, dissolving an injunction restraining the defendants from erecting a building in the city of Hudson intended to be used as a hay press in violation of a city ordinance, noted that the combustibility of the hay might be an agent for causing and promoting fires, but reiterated the rule that it is no part of equity's business to enforce the penal laws of the state unless the act sought to be enjoined is a nuisance.

The court of appeals applied the rule in *Health Dep't v. Purdon*,[25] but it also stepped aside to indicate, by way of dicta, what was to develop in the future. There, the action was brought to restrain the sale of certain adulterated teas, the possession and sale of which subjected the offenders to an indictment and actions for selling adulterated goods. Though it found the criminality of the act alone insufficient to support the action, the court continued and pointed out:

> A court's power, however, to restrain by way of injunction the continuance of an illegal trade, in the case of the exercise of any trade or business which is either illegal or dangerous to human life, detrimental to health, or the occasion of great public inconvenience, is not only conferred by the provisions of the statute, but belongs to the general powers possessed by courts of equity to prevent irreparable mischief and obviate damages for which no adequate remedy exists at law.[26]

The application of this power was made in the labor union case of *Davis v. Zimmerman*,[27] where the plaintiff's employees, while on strike, allegedly conspired to destroy his business by intimidating persons from entering his service and assaulting his new employees. Though such acts were defined as crimes by the penal code, an injunction issued on the ground that the remedy at law was inadequate for the protection of the plaintiff's property.

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[24] 7 Paige, 261 (N.Y. 1838).

[25] 99 N.Y. 237, 1 N.E. 687 (1885).

[26] *Id.* at 241, 1 N.E. at 688.

[27] 91 Hun, 489 (N.Y.App.Div. 1895).

In *Cranford v. Tyrrell,*[28] the breadth of this power as it was to be administered by the courts was demonstrated. In that action, brought to restrain the defendant from keeping a house of ill-fame and from using his premises as an assignation house, the trial court found that by such disruptive use, the plaintiff's premises had been rendered uncomfortable and its use and enjoyment interfered with. The court of appeals said: "The rule of law requires of him who complains of his neighbor's use of his property, and seeks for redress and to restrain him from such use, that he show that a substantive injury to his property is committed . . .,"[29] but found the basis of special damages capable of sustaining the plaintiff's action.

But, in an action by a village to restrain the construction of a frame building without the essential permission, as required by the village ordinance, from the trustees, an injunction was denied, the court saying: "Even if the act were a nuisance the remedy was by indictment, or in equity only at the suit of the People or of some private person who alleged special damages."[30] Again, in an action to enjoin the defendants from posting advertising bills within city limits until they complied with a city ordinance which forbade any person to post bills without obtaining a permit, the absence of an allegation of nuisance was held fatal to the complainant's action.[31]

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[28] 128 N.Y. 341, 28 N.E. 514 (1891).

[29] *Id.* at 34, 28 N.E. at 515.

[30] Village of New Rochelle v. Long, 75 Hun, 608, 609, 27 N.Y.Supp. 600 (App.Div. 1894).

[31] Village of Mt. Vernon v. Selly, 74 App.Div. 50, 77 N.Y.Supp. 250 (1902).

However, an injunction issued in *New York v. New Jersey & Staten Island Ferry Co.*[32] to restrain the defendant from using or employing boats of any kind for the transportation of persons, vehicles, animals, and goods between Staten Island and New Jersey, though the unauthorized maintenance of a ferry was defined as a misdemeanor by the penal law.

The rule in New York, as drawn by the foregoing cases, involved at its early stages, the concept of public nuisance. But the concept is scarcely more definitive than the rule of exclusion of non-proprietary interests from equitable relief, and it is, therefore, of little more value in determining the proper limits of equity's scope in these cases.[33] If valid reasons exist for the limitation of equitable intervention in criminal matters, then the fluidity with which courts apply the concept of public nuisance would seem to indicate that other criteria could be more advantageously used in determining whether a justifiable basis for equitable relief exists. The result of the absence of such other criteria is that no differentiation exists between those classes of cases which rationally call for injunctive relief and those classes for which the only basis for relief is the criminality of the act itself.

To this point, however, the fundamental theory of a property interest as an essential element in the existence of equitable jurisdiction had been perceivable, though at times blurred, in the New York cases. Apparently what proved to be the turning point in the New York decisions was the case of *People ex rel. Bennett v. Laman.*[34] In that action to restrain the defendant from practicing medicine in this state, in violation of Article 48 of the EDUCATION LAW, it was alleged that the defendant was neither licensed nor qualified to practice medicine in this state; that he fraudulently represented himself as a qualified practitioner of medicine in violation of that law;[35] and that by such practice, the defendant endangered the public health and had created a public nuisance. The defendant had been previously charged and prosecuted for the crime of unlawfully practicing medicine and was acquitted by the verdict of the jury in each instance. In reversing the order and judgment of the supreme court at special term[36] and the appellate division's affirmance thereof,[37] the court of appeals found that on the facts, as alleged, there were grounds upon which an injunction might issue, saying:

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[32] 173 App.Div. 496, 159 N.Y.Supp. 434 (1916) *affirming* 92 Misc. 40, 155 N.Y.Supp. 937 (Sup.Ct. 1915).

[33] Ballantine, *op. cit. supra* at note 17; Caldwell, *op. cit. supra* at note 17.

[34] 277 N.Y. 368, 14 N.E.2d 439 (1938), 24 CORN.L.Q. 118 (1938), 17 TEX.L.REV. 219 (1939), 25 VA.L.REV. 99 (1938).

> That equity will not undertake the enforcement of the criminal law, and will not enjoin the commission of the crime is a principle of equity jurisprudence that is settled beyond question. There can equally be no doubt that the criminal nature of an act will not deprive equity of the jurisdiction that would otherwise attach . . . (citing, *inter alia, In re Debs*).[38] Whether or not the act sought to be enjoined is a crime, is immaterial. Equity does not seek to enjoin it simply because it is a crime; it seeks to protect some property interest. . . . Equity does not pretend to punish the perpetrator of the act; it attempts to protect the right of the party (here the People) seeking relief, and to prevent the performance of the act or acts, which here may injure many.[39]

Obviously, the import of these words was not the signification of a drastic departure from the rule; nor was it necessarily a mandate for the broader application of equitable relief in the field of criminal law. In *City of Utica v. Ortner,*[40] decided the same year, the result was in keeping with equity's refusal to assume criminal jurisdiction, though an injunction issued restraining the maintenance of a funeral parlor in violation of a zoning ordinance. Injunctions restraining violations of zoning ordinances had, on several occasions, issued at the instance of one who would be specially damaged by the violation.[41] But the court's statement, "No special damage or injury to the public need be alleged," [42] is difficult to support in reason and not founded upon the authority of the cases.

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[35] N.Y. EDUCATION LAW § 1263 defines the unlawful practice of medicine, as alleged in the complaint, as a misdemeanor, for which a first offender may be punished by fine or imprisonment, or both, and a second offender is mandatorily punished by both.

[36] 158 Misc. 909, 286 N.Y.Supp. 467 (Sup.Ct. 1937).

[37] 250 App.Div. 660, 295 N.Y.Supp. 728 (1937).

[38] 158 U.S. 564 (1895).

[39] 277 N.Y. 368, 376, 14 N.E.2d 439, 442.

A more conservative statement was made by the court of appeals in *Marcus v. Village of Mamaroneck.*[43] There, a village zoning ordinance designated the defendant's property as being within a residential district, and use in violation thereof was held to be enjoinable at the instance of neighboring property owners where special damage, as a prerequisite to relief, was shown to have been incurred by them. It has also been observed, subsequent to the *Laman* case, that in the absence of statutory authority, mere violation of a criminal statute is not, in and of itself, sufficient to merit the issuance of an injunction.[44] Again, in an action by an employee of a stevedoring company, on behalf of himself and others similarly situated, to enjoin the hiring of new employees in violation of the Waterfront Commission Compact,[45] the court denied an injunction on the ground, *inter alia,* that equity will not enjoin a crime, saying: ''It is well established law, too, that where the injury complained of is in fact a public injury, and the right violated is a public right, an individual cannot maintain an action for an injunction or for any other relief, unless he suffers a special injury different from that suffered by the public at large.''[46]

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[40] 256 App.Div. 1039, 10 N.Y.S.2d 729 (1939).

[41] Bailor v. Ringe, 255 App.Div. 976, 8 N.Y.S.2d 99 (1938) *reargument denied* 256 App.Div. 818, 9 N.Y.S.2d 58 (1939) (injunction granted to restrain the use of premises as a funeral chapel in violation of a city ordinance); Kaltenbach v. Benisch, 252 App.Div. 788, 299 N.Y.Supp. 276 (1937) (order pendente lite restraining the unauthorized operation of a gasoline station upheld); Roock v. Womer, 233 App.Div. 566, 253 N.Y. Supp. 357 (1931) (violation of setback line in zoning ordinance enjoined); Rice v. Van Vraken, 225 App.Div. 179, 232 N.Y.Supp. 506 (1929) *aff'd.* 255 N.Y. 541, 175 N.E. 304 (1930) (injunction granted to restrain the erection of an apartment in violation of a municipal zoning ordinance). See also Hecke, *Injunctions to Remove or Remodel Structures in Violation of Building Restrictions,* 32 TEX.L.REV. 521 (1954); Note, 129 A.L.R. 885 (1940).

[42] City of Utica v. Ortner, 256 App.Div. 1039, 10 N.Y.S.2d 729, 730. *Cf.* Armstrong v. Gibson & Cushman, Inc., 202 Misc. 399, 117 N.Y.S.2d 185 (Sup.Ct. 1952), where an injunction issued to restrain the defendant's use of his property in violation of a zoning ordinance on the theory that the personal or property rights of the individual maintaining the action had been injured.

[43] 283 N.Y. 325, 28 N.E.2d 856 (1940).

It seems, then, that an injunction to restrain the violation of acts, which constitute a crime does not inevitably issue merely upon the basis of the criminality of the act itself, under the rule as expressed in the *Laman* case. Nevertheless, courts do fall into error in the application of the case's result, and the ultimate result is, in those circumstances, the indiscriminate exercise of equitable remedies for the enforcement of the criminal law.

Turning back to the most recent exercise of equitable jurisdiction in this matter, the danger inherent in the careless assumption of grounds for equitable relief is focused. In *City of New York v. Windsor Madison Corporation,*[47] the court's only concern seems to have been whether or not the defendant's acts, *i.e.,* his advertisement of a forced-out-of-business sale, were within the prohibition of the statute.[48] From that circumstance alone, it seems to have concluded that equitable relief should be granted under the rule of the *Laman* case. It has been observed that this conclusion does not inexorably follow from that decision. Interference is also indefensible when unsupported by any justification other than the criminality of the act.

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[44] People v. Masiello, 263 App.Div. 838, 31 N.Y.S.2d 512 (1941) *appeal dismissed* 287 N.Y. 852, 40 N.E.2d 48 (1942) (special statutory authority); People v. Gilberg, 21 N.Y.S.2d 920 (Ct.Spec.Sess. 1940) (citing the *Laman* case as standing for the proposition that, in the absence of statutory authority equity has no inherent power to exercise its mandates in respect to criminal statutes; case decided on other grounds).

[45] Cuff v. Ryan Stevedoring Co., 142 N.Y.S.2d 57 (Sup.Ct. 1955).

[46] *Id.* at 62.

[47] 14 Misc.2d 674, 179 N.Y.S.2d 734 (Sup.Ct. 1958).

Moreover, a justification for equitable interference cannot be found in the inveterate character of the defendant's breach of the criminal statute. If the breach has in fact occurred, the legislative enactment must be deemed to be sufficient in the absence of some injury to the petitioner. The protection of the criminal law and procedure seems to be the better method of determining the existence of a need for remedial relief. Therefore, the existence of the institution of a large number of proceedings under the penal provision is not a valid ground for intervention, whether the cause failed or proceeded to a finding of guilty with resultant assessment of a penalty.

Perhaps a realization of the fundamental proposition that the court's authority over acts which are incidentally criminal in their nature arises from the nature of the facts and their consequences, rather than exclusively from their criminality, is all that is needed for the judicious use of the injunction. It could be that the disintegration of the strict proprietary interest requisites for equitable relief[49] has lulled courts into their failure to found equitable relief upon principles of civil liability, rather than guilt within the definition of a penal statute. Whatever the factors, compelling reasons exist for the preservation of equity's insistence upon civil, rather than criminal, bases for its injunctive remedy to be exercised.

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[48] What apparently induced the court into feeling that a basis for injunctive relief existed was expressed by the court when it said: "It is not the degree of truth or falsity of the particular sign or advertisement that is the overriding concern herein; rather, it is the appraisal of the advertisements as a group in the light of the requirements of the statute . . ." *Id.* at 676, 179 N.Y.S.2d at 737.

[49] See, *e.g.,* Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946), and the discussion in Baumann v. Baumann, 250 N.Y. 382, 165 N.E. 819 (1929). See also Pound, *Equitable Relief Against Defamation and Injuries to Personality,* 29 HARV.L.REV. 640 (1916); Note, 175 A.L.R. 438 (1948).

JOHN C. RICE

The Effect of Pupil Placement Laws Upon Southern Education

Reports from private discussions now current in the inner councils of Southern states where school racial segregation is still mandatory by law are that officials there recognize, though their constituents as yet do not, that the constitutional crisis over these statutes has passed into history. The end of the legal phase of 'massive resistance' came so quietly—in the Supreme Court chamber, November 24, 1958—that the country at large also remains unaware of it.

But the affirmation by the Supreme Court that day of the lower Federal court three-judge decision which sustained the Alabama Pupil Placement Law supplanted the legal constitutional crisis with a new phase because of what the lower tribunal had ruled. This ruling not only showed the South a means whereby most all-white schools can constitutionally be preserved. By finally dooming the 'massive resistance' laws it also left the states which have such laws (statutory or by constitutional command) politically free to remove their principal fear of school racial integration by putting boys and girls in separate schools.[1]

Since the rulings in the School Segregation cases[2] prohibiting admission to public schools on the basis of race as a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment, many southern states have enacted pupil placement laws to circumvent the effect of these decisions. Not all of the statutes have been declared unconstitutional because federal courts have found that these laws were constitutional on their face or were being enforced in a proper manner in failing to segregate children solely on the basis of race.

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[1] Arthur Krock, New York Times, December 30, 1958, page 34, column 4.

[2] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

The equal protection clause of the Fourteenth Amendment does not affirmatively command integration, but it does forbid any state action requiring segregation on account of race or color of children in public schools.[3] Pupils may be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but such child is entitled to be treated as an individual without regard to his race or color. Whenever children are excluded from any public school because of their race or color they are being denied their constitutional rights.[4] An examination of these pupil placement laws will reveal whether the "constitutional crisis over these statutes"[5] has indeed passed into history. When this is accomplished an inspection of the Supreme Court affirmation of the lower federal court three-judge decision will also be informative.[6]

In *Bush v. Orleans Parish School Board*[7] a pupil assignment statute enacted pursuant to an amendment to the state constitution was considered. The constitution had already provided that all public elementary and secondary schools should be operated separately for white and colored children and the amendment added that "this provision is made in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race."[8] The Pupil Assignment Statute[9] provided for assignment of each pupil each year by the Parish Superintendent to a particular school without providing any standards other than those of Act 555 for the separation of the races. The court held that the state constitutional provision maintaining separate schools for white and colored children violated the equal protection clause of the Fourteenth Amendment. It declared that the provision and the statute designed to implement it was void and of no effect.

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[3] Avery v. Wichita Falls Independent School District, 241 F.2d 230, 233 (5 Cir. 1957).

[4] Borders v. Rippy, 247 F. 2d 268, 271 (5 Cir. 1957).

[5] Krock, supra Note 1.

[6] Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372 (N.D. Ala. 1958); *aff'd mem.* 358 U.S. 101 (1958).

[7] 138 F. Supp. 336 (E.D. La. 1956) *aff'd,* 242 F. 2d 156, (5 Cir. 1957), *cert. denied,* 354 U.S. 921 (1957).

[8] L.S.A. Const. Art. 12, §1 (1954).

[9] L.S.A.-R.S., 17: 331–36 (1954).

The Court in passing, cited *Buchanan v. Warley*[10] stating that:

> The authority of the states to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad. . . . But . . . the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitation of the Federal Constitution.

The statute required parish school superintendents to determine annually public schools to be attended by applicants and provided for hearings where dissatisfaction with assignments arose. It was declared invalid as an unlawful delegation of legislative authority because no standards were included on which the superintendent could base assignments.

An elaborate statutory scheme was under scrutiny in *Adkins v. School Board of The City of Newport News.*[11] Virginia had passed a Pupil Placement Act[12] which required the Pupil Placement Board, in Chapter 70, to consider certain factors, among them being:

1. The effect of the enrollment on the welfare and best interests of such child and all other children in said school as well as the effect on the efficiency of the operation of said school;

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[10] 245 U.S. 60, 74 (1916).

[11] 246 F. 2d 325 (4 Cir. 1957).

[12] Code of Va. § 22–231.21 (1956).

2. The health of the child as compared to other children in the school;
6. Availability of transportation;
7. The sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socioeconomic class consciousness among the pupils;
8. Such other relevant matters as may be pertinent to the efficient operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district.

The General Assembly of Virginia in a policy statement had indicated what it considered an efficient system of public schools.

> An efficient system of . . . public schools means and shall be only that system within each county, city or town in which no . . . school consists of a student body in which white and colored children are taught.[13]

If a Negro child was enrolled in any school by the Pupil Placement Board, ignoring the legislative statement in which white children were already enrolled, or vice versa, or if the Governor or any court ordered the enrollment in such a school, the school was to be closed and removed from the public school system under the statutory provisions. In view of the manifested, legislative intent the lack of any adequate administrative remedy and in view of the fact that the public school would be closed, the court held that section 22–231.21 was unconstitutional on its face.

Commenting on the failure to exhaust their administrative remedy, the court said that persons must do so but that such remedies must be adequate.

The Pupil Assignment Act [14] in Nashville, Tennessee, was considered in *Kelly v. Board of Education.*[15] Section 2 of the act required the board of education to consider and base its decision on any one or more of a large number of factors similar, in fact using the same language, to the Virginia Act. The court did not decide if the Pupil Assignment Act was unconstitutional but stated that nothing in the act precluded a board of education from considering racial distinctions in making pupil assignments. Nor was there anything in the act inconsistent with a continued policy of compulsory racial segregation. The court felt that the administrative remedy did not afford any opportunity to resist the fixed policy of the board to operate the schools on a compulsory segregated basis. As a result, the petitioners, Negro children, were not required to exhaust the administrative remedy available.

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[13] Adkins v. School Board of the City of Newport News, *supra* note 11.

[14] Public Acts Tenn. Chs. 9–13, §2 (1957).

[15] 159 F. Supp. 272 (M.D. Tenn. 1958).

A similar case is *Gibson v. Board of Public Instruction of Dade County*[16] where the administrative remedy was also found wanting. The Board of Public Instruction considered it, stating that:

> . . . the best interest of the pupils and the orderly and efficient administration of the school system can be best preserved if the registration and attendance of pupils entering school commencing the current school term remains unchanged. Therefore, the Superintendent, principals and all other personnel concerned are herewith advised that until further notice the free public school system of Dade County will continue to be operated, maintained and conducted on a non-integrated basis.[17]

In view of the policy of the school board, any application to a school other than a segregated school maintained for colored pupils, would have been futile. The failure of the plaintiffs to exhaust their administrative remedies under the Florida Pupil Assignment Laws[18] did not preclude the court from giving judicial aid.

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[16] 246 F. 2d 913 (5 Cir. 1957).

[17] *Id* at 915.

[18] F.S.A. §230–31 (1956).

> Neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial segregation in the public schools. So long as that requirement continues throughout the public school system of Dade County, it would be premature to consider the effect of the Florida laws as to the assignment of pupils to particular schools.[19]

Another interesting case concerned the denial of Negro children the right to attend public schools due to the fact that the school buildings were completely filled and to admit Negroes would require white children to be displaced.[20] But it was held there that overcrowding in public school rooms could not be lawfully prevented or relieved by excluding pupils on the basis of their race or color.

In *Carson v. Warlick*[21] the North Carolina Pupil Enrollment Act was before the court. It required the enrollment to be made "so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, and general welfare of such pupils."[22] Here the statute was not held unconstitutional on its face and the question of whether it had been unconstitutionally applied could not be decided because the administrative remedy provided by the act had not been invoked. The statute was not unconstitutional on its face because adequate standards for the exercise of discretion of the administrative body were provided. In passing at page 728, the court cited *Opp Cotton Mills v. Administrator:*

> The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when

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[19] 246 F. 2d 913, 914 (5 Cir. 1957).

[20] Clemons v. Board of Education, 228 F. 2d 853 (6 Cir. 1956).

[21] 238 F. 2d 724 (4 Cir. 1956).

[22] *Id* at 728.

[23] 312 U.S. 126, 145 (1940).

> Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective. The authority given the boards is of a fact-finding and administrative nature, and hence is lawfully conferred.

Somebody must enroll the pupils in the schools and the Court declared that it would be presumed that the school boards and school officials would obey the law, observe the legislative standards, and avoid the discrimination on account of race which the Constitution forbids. Failure to apply for a hearing to the school board as an individual by the child, denied admission was the proper method to appeal a denial. But in the principal case, a joint petition was filed.

These school children have a right to be admitted to the schools of North Carolina without discrimination on account of race, but they are admitted as individuals not as a class or group, and it is as individuals that their rights under the Constitution are asserted.[24]

In the first instance, state school authorities must pass on their right to be admitted to any school. The state prescribed the administrative procedure to be followed, and since this procedure did not violate constitutional requirements, the Court would not interfere.

With these cases serving as a background, it will be fruitful to examine the *Shuttlesworth* [25] case at this point. Petitioners maintained that the Alabama School Placement Law [26] was unconstitutional on its face. The law provided that:

> In the assignment, transfer or continuance of pupils among and within the schools or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil as well as other relevant matters;

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[24] Henderson v. United States, 339 U.S. 816, 824 (1950).

[25] Shuttlesworth v. Birmingham Board of Education, *supra* note 6.

[26] Acts Ala. 1955, Page 492, § 1, 14 as amended by Acts 1957, Page 482.

> Available room and teaching capacity in the various schools; the availability of transportation; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for the particular pupil; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; *the psychological qualification of the pupil for the type of teaching and association involved;* the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards in a particular school; *the physical effect upon the pupil on attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community;* the home environment of the pupil; *the maintenance or severance of established social and psychological relationships with other pupils and with teachers;* the choice and interest of the pupil, the conduct, health and personal standards of the pupil; the request or consent of parents or guardian and the reason assigned therefor.[27]

The tests italicized were the ones to which the plaintiffs particularly objected. Some of the others they conceded to be proper and even desirable. The court felt the situation was analogous to the North Carolina Pupil Enrollment Act, referred to previously. There was no showing that the exclusion was based upon any other ground than one or more of the admittedly proper tests. The court stated;

> No proof was offered as to the available room, the teaching capacity, or the availability of transportation facilities in the schools of plaintiffs choice. Such proof being totally absent, no Court can assume that the plaintiffs can be admitted . . . without overtaking already crowded rooms, classes or school buses.[28]

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[27] Shuttlesworth v. Birmingham Board of Education, *supra* note 6, at 382.

[28] *Id.* at 383.

Since pupils must be enrolled in the school, the court felt that school officials were better qualified and that it must be presumed that these officials will obey the law in observing the tests prescribed, thereby avoiding racial discrimination. Specific reference was made to *Carson v. Warlick*. Upon its face, the law was deemed constitutional. It furnished the legal machinery for an orderly administration of the public schools upon the basis of individual merit. The court concluded that if in the future it was being administered in such a way as to consider race or color in admitting pupils to public schools, then the School Placement Law would be declared unconstitutional in its application in such a case.

Certain principles must be kept in mind when dealing with public education.

> It must be remembered that the decisions of the Supreme Court of the United States in *Brown v. Board of Education,* do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of that Court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court.[29]

If this thought is not forgotten, then when a law such as the Alabama Pupil Placement Law is upheld, no great surprise will result. Federal courts will strike down a law which is either unconstitutional on its face, or one being administered in such a way as to exclude qualified students on the basis of race or color. The *Shuttlesworth*[30] case must be considered only for what it tells us. Since the law was constitutional on its face, the Court could do nothing else. But, if a similar act, or in fact the same one, is used to practice racial discrimination in public schools, there is no doubt that the courts will invalidate them.

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[29] Thompson v. County School Board of Arlington County, 144 F. Supp. 239, 240 (E.D. Va. 1956).

[30] Shuttlesworth v. Birmingham Board of Education, *supra* note 6.

GERALD NATHAN DAFFNER

What Constitutes a Public Use

One of the awesome problems that is facing most of America's cities is slum clearance. In an effort to alleviate this problem, most cities have turned to planned redevolopment projects. No one would question the desirability of alleviating the conditions that exist in the slums, nor would they object to the social benefits derived from slum elimination. However, as in all movements of this type, the majority is prone to neglect the rights of the minority in the drive to obtain the long-sought-after Utopia, and the rights most often overlooked are those of the owner of the slum property which is to be redeveloped.

This article will attempt to review the changing concept of the exercise of eminent domain in furtherance of these projects. The number of legal questions and problems involved in eminent domain are too varied and wide ranging to be discussed in any short article. The facet of the problem which will be discussed is what constitutes a "public use," for which property may be taken in New York State.

The power of eminent domain is derived from the inherent political rights of the sovereign.

> It means nothing more or less than an inherent political right, founded on a common necessity and interest, of appropriating the property of individual members of the community to the great necessities of the whole community. . . . This power is inherent in, and essential to, the existence of all government, even in the most primitive forms.[1]

There is no doubt that the power of eminent domain may be exercised by the state of New York, but it is not an unlimited power.[2] The New York State Constitution states:

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[1] 18 Am. Jur. *Eminent Domain* § 2 (1938).

[2] People v. Priest, 206 N.Y.274, 99 N.E. 547 (1912).

"Private property shall not be taken for public use without just compensation."[3] From the beginning, this provision has been interpreted by the courts as meaning that private property shall not be taken for any use except a public use.[4] Conversely, the courts have consistently held that private property cannot be taken for a private use even if just compensation is paid.[5]

The exercise of the power of eminent domain rests in the legislature, and the extent and nature of the estate to be acquired in condemnation proceedings rests in its discretion.[6] This discretion is, of course, subject to the limitation that the power is exercised only for a public use. Although the courts pay heed to the doctrine of legislative discretion, the question of public use is ultimately a judicial one.

> The term "public use," as used in connection with the right of eminent domain, is not easily defined. The legislature has no power to take the property of one individual and pass it over to another, unless the use to which it is to be applied is for the public benefit. The question of public use is a judicial one and must be determined by the courts.[7]

The most vexing feature of this question is that no court has yet supplied an all-encompassing answer. The very nature of the question coupled with the changing needs of society makes a definitive answer impossible. A study of previous cases fails to supply an answer. The concept of public use is a changing one and therefore, particularly vexatious to the doctrine of *stare decisis.* The question is entirely an American one and no help can be found from a reading of English cases. The main reason for the lack of help from English cases is the difference in the systems of government. It is true that both systems claim the power of eminent domain as an inherent power of a sovereign government, and the power to condemn resides in the respective legislatures. However, there is no such thing as a separation of powers in English law, and the laws of Parliament cannot be declared unconstitutional by any court; Parliament is the sole judge of the constitutionality of its laws. When land is taken by an act of Parliament, title passes to the government or its delegated agent upon passage of the act; the only question open to the English courts is that of compensation.

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[3] N.Y. CONST. art. I, § 7(a) (1933).

[4] Embury v. Conner, 3 N.Y.511 (1850). Matter of Albany St., 11 Wend. 148 (N.Y. 1834). Bloodgood v. Mohawk & Hudson R. Co., 18 Wend. 2 (N.Y. 1837).

[5] Hopper v. Britt, 203 N.Y.144, 96 N.E.371 (1911). Brevoort v. Grace, 53 N.Y.245 (1873).

[6] In re New York, 190 N.Y.350, 83 N.E.299 (1907); See also, In re Niagara Falls etc. R. Co., 108 N.Y.375, 15 N.E. 429 (1888); In re Brooklyn Union Ferry Co., 98 N.Y.139 (1885).

[7] Pocantico Water-Works Co. v. Bird, 130 N.Y.249, 258, 29 N.E.246, 248 (1891).

In the United States and in New York State, the legislature passes an act delegating the power of eminent domain to certain agents to act for it. The legislature may delegate this power to a state agency, private corporations or individuals.[8] The question of public use becomes a judicial one when those affected by condemnation proceedings challenge them in the courts on constitutional grounds.

> It [the power of eminent domain] is not affected by the agency employed, for it may be vested in private persons, who may be actuated solely by motives of private gain, if the use to be made thereof is for the benefit of the public.[9]

A study of the American cases reveals the development of two doctrines of public use in our courts which are rigorously opposed to each other, but neither view provides a satisfactory, all-enveloping answer to the question of what a public use is. By the admission of the courts themselves, the question is decided on an *ad hoc* basis. Judge Crouch of the New York Court of Appeals said in his opinion in the *Muller* case in 1936:

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[8] People v. New York, 198 N.Y.439, 92 N.E.18 (1910); see also, Pocantico Water-Works Co. v. Bird, 130 N.Y.249, 29 N.E.246 (1891). In re Brooklyn Union Ferry Co., 98 N.Y.139 (1885).

[9] Pocantico Water-Works Co. v. Bird, 130 N.Y, 249, 258–59, 29 N.E. 2d 246, 248 (1891).

> Over many years and in a multitude of cases the courts have vainly attempted to define comprehensively the concept of a public use and to formulate a universal test. They have found here as elsewhere that to formulate anything ultimate, even though it were possible, would, in an inevitably changing world, be unwise if not futile. Lacking a controlling precedent, we deal with the question as it presents itself on the facts at the present point of time.[10]

The two doctrines used by the courts will be referred to, for the sake of convenience, as the narrow doctrine and the broad doctrine; the name alone suggests the difficulty of reconciling the two. In New York State, both doctrines have been used by the courts at different times during the development of the law of eminent domain. In the years immediately following the American Revolution and during the adoption of the federal system, there was not much dispute about the problem of public use. Therefore, it is not surprising that the original New York State Constitution did not directly prohibit the taking of private land for a private use. Indeed, it was not until the Constitution of 1821 that the present Article 1, Section 7 was thought necessary:[11]

> The taking of property for private use under color of eminent domain was not a debated issue when the constitutions of the states were adopted. Eminent domain was employed without objection for purposes such as mills, private roads and the drainage of public lands, which now seem rather private than public, and the extension of the power to any uses directly or indirectly enuring to

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[10] N.Y. City Housing Authority v. Muller, 270 N.Y.333, 340, 1 N.E.2d 153, 155 (1936).

[11] N.Y. CONST. art. VII § 7 (1821).

> the public good was not one of the evils of which the colonists complained. . . . In its more subtle form, as it presents itself today, as the taking of property for the benefit of some enterprise in which the public welfare is to an insufficient but none the less perceptible degree involved, it had apparently never occurred to anyone that it might be attempted.[12]

Therefore, when the problem did arise and since there were no words in the state constitution forbidding the taking of property for a private use, the courts implied the prohibition from the words of the constitution forbidding the taking of property for a public use without just compensation [13] and from the concept of "natural justice." [14]

The distinction between the broad and narrow views of public use arose in 1837 in *Bloodgood v. Mohawk & Hudson R. Co.*,[15] in the dictum laid down by Senator Tracy. Although it was only dictum, the distinction between public use and public benefit was cited thereafter in support of the narrow view.

The narrow view holds that to be for the public use, the public must be entitled as of right to use or enjoy the use of the property so condemned. The broad view is that the condemnation and later use of the property need only be for the public benefit or common good in order to be a public use. Under both views, however, the use does not have to extend to the great public at large but may be confined to the inhabitants of a small community or restricted locality; still the use must be for all those in common and not a particular individual.[16] In the early cases involving mills and private roads, the thought of the courts was that all people had the right to use a mill and, therefore, taking property for that purpose was a public use.

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[12] SACKMAN AND VAN BRUNT, NICHOLS ON EMINENT DOMAIN 423 (3rd ed. 1950).

[13] N.Y. CONST. art. I, § 7(a) (1933).

[14] supra n. 4.

[15] Bloodgood v. Mohawk & Hudson R. Co., 18 Wend. 59 (N.Y. 1837).

[16] New York City Housing Authority v. Muller, 155 Misc.681, 279 N.Y.S. 299 (1935), In re Split Rock Cable-Road Co., 128 N.Y.408, 28 N.E.506 (1891), Pocantico Water-Works Co. v. Bird, 130 N.Y.249, 29 N.E. 246 (1891).

The narrow concept of public use was adopted by the New York courts and followed throughout the nineteenth century. The courts were loathe to violate individual property rights for any purpose which could merely be regarded as an advantage to the public. However, it must be kept in mind that during the nineteenth century in America there was, in comparison with the present, a definite lack of participation by the government in any eminent domain proceedings, except those which would foster transportation or help what would now be called public utility companies. The state was not then as ''welfare-minded'' as it is now. Usually the only projects in which the state brought into use its power of eminent domain were such things as water supply, canals, railroads and streets. Also of course, eminent domain was used to acquire land for public buildings. It is probably fair to say that these were the uses which the ''founding fathers'' may have contemplated (with the exception of railroads). The problems of interpretation began to arise when the country began to feel the effects of the industrial revolution, and a different way of life began to emerge; cities began to grow quickly and life became more centralized and the economy began to cease being mainly agrarian.

In 1881, the legislature passed a law,[17] delegating the power of eminent domain to the Eureka Basin Warehouse and Manufacturing Co. which then condemned some land in Kings County on which it planned to construct docks and warehouses. In holding the condemnation unconstitutional, Judge Rapallo said:

> The taking of private property for private purposes cannot be authorized even by legislative act, and the fact that

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[17] N.Y. SESS. LAWS 1881, ch. 637.

> the use to which the property is intended to be put, or the structure intended to be built thereon will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufacturers, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public.[18]

It is obvious from this opinion that New York still held to the narrow doctrine rigorously. In 1891, this doctrine was reaffirmed and further explained in regard to who should have use of the property in order to make the use public. The situation arose through an effort by the Pocantico Water Works Co. to condemn property to enlarge its facilities which supplied the town of Tarrytown. In enlarging its facilities, the plaintiff also contracted to supply some of the riparian owners with water. The defendant contested the condemnation on the ground that by contracting with individuals, the company was not making a public use of the land. In upholding the right of the company to condemn, Judge Haight disposed of the defendant's argument with this reasoning:

> The term public use implies ''the use of many'' or ''by the public,'' but it may be limited to the inhabitants of a small or restricted locality, but the use must be in common and not for a particular individual.[19]

One year later, the doctrine was again reaffirmed by Judge Peckham. The city of New York condemned some waterfront property and then proceeded to lease it to private corporations which ran the piers and wharves under their exclusive control. The court found that the power of eminent domain had been exercised in furtherance of a public use. It reasoned that since the city needed the commerce, if the city government thought that the most efficient way was the method of leasing to private corporations and giving them exclusive control, then that method was valid. It should be remembered that the city did not sell the piers but merely leased them, thereby retaining ownership. In his opinion, Judge Peckham reiterated the distinction between public use and public benefit, and held to the narrow interpretation saying:

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[18] Re Eureka Basin Warehouse and Mfg. Co., 96 N.Y.42, 48–9 (1884).

[19] Pocantico Water-Works Co. v. Bird, 130 N.Y.249, 259, 29 N.E.246, 248 (1891).

> The question whether or not it be such an use is a judicial one. There is, as I think, unquestionably a distinction between the use which is public and an interest which is public, and where there is simply a public interest, as distinguished from a public use, the right of eminent domain cannot be exercised. The interest may be of a public nature when the use may tend incidentally to benefit the public in some collateral way. In such cases the right to take property *in invitum* does not exist.[20]

New York courts entered the twentieth century still clinging to the narrow view. This is not to say that the broad doctrine was not being followed in other jurisdictions; it had made inroads upon the judicial decisions in many jurisdictions. However, as cities grew older and slums became more numerous, the legislature began to search for ways to cure the problems. At first, the legislature relied solely upon the police powers of the state to combat the evils produced by slums. These laws regulating sanitary conditions and minimum housing standards seemed to help, but as the years wore on, it became increasingly evident that only reconstruction of these areas would do the job. The First World War probably delayed the tide of this movement for awhile, but it eventually served to accentuate the problem. However, as late as 1928, the Court of Appeals was still upholding the narrow doctrine with no apparent deviation or weakening. In a case upholding the right of a public utility to condemn land for its purposes, Judge O'Brien emphasized:

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[20] Matter of Mayor etc. of N.Y., 135 N.Y.253, 259, 31 N.E.1043, 1044 (1892).

> The only theory upon which the legislature can delegate to respondent the right to take private property is founded upon the right of the general public to use the heat, light or power generated by respondent.[21]

Whether the Judge realized it or not, this strong and vigorous reaffirmation of faith in the narrow interpretation was in fact its last gasp. The doctrine did not die slowly or through the painful attrition of constant modification. The narrow concept died a swift and merciful death only eight years later in the famous case, *The New York City Housing Authority v. Muller*.[22] This case abruptly and completely abandoned the narrow concept in favor of the broad view; it was a complete reversal of the preceding cases. Part of the opinion by Judge Crouch is quoted:

> The fundamental purpose of government is to protect the health, safety, and general welfare of the public. All its complicated activities have that simple end in view. Its power plant for the purpose consists of the power of taxation, the police power and the power of eminent domain. Whenever there arises, in the state, a condition of affairs holding a substantial menace to the public health, safety or general welfare, it becomes the duty of the government to apply whatever power is necessary and appropriate to check it. There are differences in the nature and characteristics of the powers, though distinction between them is often fine. [cases cited]. But if the menace is serious enough to the public to warrant public action and the power applied is reasonably and fairly calculated to check it, and bears a reasonable relation to the evil, it seems to be constitutionally immaterial whether one or another of the sovereign powers is employed.

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[21] People ex rel Horton v. Prendergast, 248 N.Y.215, 223, 162 N.E.10, 12 (1928).

[22] N.Y. City Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936).

> The menace of the slums in New York city has been long recognized as serious enough to warrant public action. The Session Laws for nearly seventy years past are sprinkled with acts applying the taxing power and the police power in attempts to cure or check it. The slums still stand. The menace still exists. What objections, then, can be urged to the application of the third power, least drastic, but as here embodied, probably the most effective of all?[23]

This case is considered by the proponents of redevelopment programs as the milestone in New York law. However, it does not bear up very well under close legal scrutiny. The court never answered the questions it had asked in the above quotation; that is, it did not give any answers supported by the law. It merely said "Why not?", and then came to the desired conclusion. Obviously there are many objections which can be made to the application of the power of eminent domain, and the court had previously staunchly upheld such objections. The court seemed to disregard completely all the past decisions on the subject of public use in eminent domain. The decision obliterated the time-honored distinction between public use and public benefit; it amalgamated public benefit into public use.

The *Muller Case* confuses the difference between the police powers and the power of eminent domain. It mentions that there are distinctions, but that the distinctions are fine ones; the body of the law is composed of fine distinctions. The police powers are used to preserve the public health and safety, but the power of eminent domain can only be used when there is a public use involved. According to the decisions prior to the *Muller* case, a public use did not involve uses which merely benefited the public as a whole; that reasoning formed the whole basis of the narrow view. Simply because a situation falls within the police power of the state is not a valid reason for stating that the remedying of such a situation is *ipso facto* a public use under the power of eminent domain, which is a separate power with its own distinct limitations.

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[23] *Id.* at 340–341, 1 N.E.2d at 155.

However, any criticism of the *Muller* case can only be classified as a requiem for the narrow view of public use. That view has been completely repudiated by the courts, and the broad view of a public use being equivalent to a public benefit has completely taken its place. In the particular cases having to do with slum elimination and redevelopment, the constitutional amendment in 1938 [24] seems to have eliminated even the most remote possibility of a resurgence of the narrow view. The courts have consistently interpreted this article, which gives the state power to construct low-income housing and to redevelop slum areas, as implying that slum redevelopment is a public use for which the state may use, or delegate the use of, the power of eminent domain.[25]

There are, of course, very logical and weighty arguments for the broad view, especially in view of the housing situation in many large cities. The law must move with the times, and as society changes, so must the law. Yet the fact remains that the *Muller* case opened the door far more widely than the situation required. There are no bounds to the doctrine enunciated there. The law should provide as much stability as possible, and as the term ''public use'' stands, no one knows what the limits of the exercise of eminent domain are today.

The case of *Berman v. Parker* [26] shows the extent to which courts have been willing to go along with planning commissions in recent years under the broad view. An excerpt will serve to show how very few limits, if any, are placed on the exercise of eminent domain in furtherance of redevelopment plans.

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[24] N.Y. CONST. art. XVIII § 1 (1938).

[25] Murray v. LaGuardia, 291 N.Y.320, 52 N.E.2d 884 (1943). Deniham Enterprises, Inc. v. O'Dwyer, 302 N.Y.451, 99 N.E.2d 235 (1951).

[26] Berman v. Parker, 348 U.S.26 (1954).

> In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. . . .
>
> . . . What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the over-all plan.[27]

The power of the federal government over the District of Columbia, in respect to eminent domain, is similar to the power of the state legislatures.

Both doctrines of interpretation have their own peculiar difficulties. Under the narrow view, it is conceivable that land could be condemned for private hotels in New York, since the law requires hotels to serve the public at large. Also, of course, the narrow view does impede the progress of slum redevelopment by private corporations, and this is a substantial factor. But the broad view impedes nothing, and that is its main defect. Under the law as it presently is interpreted, it is impossible to determine the limits, if any, of the exercise of the power of eminent domain. It is not inconceivable that the state could use the power to condemn farmland and then redistribute it on the theory that the public will benefit if more people occupy less acreage, or the public will benefit if only farmers who are graduates of certified agricultural schools are allowed to till the soil. It is also possible under the broad view that the state could condemn a property owner's house because it has not been painted in the last three years and therefore, is a blight on the neighborhood. These very extreme examples are only used to point out the fact that under the broad view of public use, nobody knows what the limits of the power of eminent domain are, for the future, or, and even more important, what they are now.

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[27] Berman v. Parker, 348 U.S.33–34 (1954).

If the court had merely expanded the narrow doctrine in its decision in the *Muller*[28] case, in order to encompass the situation, the law would still have some limits left. But in completely overturning the narrow view, it failed to substitute an adequate standard for future reference.

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[28] N.Y. City Housing Authority v. Muller, 270 N.Y.333, 1 N.E.2d 153 (1936).

Recent Decisions

CONDEMNATION PROCEEDINGS—INVALID WHEN USED FOR PRIVATE BENEFIT

May a taxpayer maintain an action to nullify the closing and discontinuance of an interior city street? May a municipal corporation take public property by condemnation proceedings with a preconceived plan to release it solely for the benefit of private use? These problems are presented in the case of *Stahl Soap Corporation v. City of New York,* 5 N.Y.2d 200, 156 N.E.2d 443, 182 N.Y.S.2d 808 (1959).

In this case Liebman Breweries owned all the land abutting a city street in Brooklyn. They wanted the street closed to the public so that it could be used for a parking area and industrial expansion. In furtherance of this object negotiations were entered into between Liebman Breweries and the City of New York, and an agreement resulted which was approved by the corporation counsel and accepted by the Board of Estimate. The agreement was to discontinue the street, bring condemnation proceedings, and to authorize the mayor and the city clerk to execute a deed releasing the city's interest in the street to Liebman Breweries. The complaint charged that the street was not closed for any public necessity but for the sole purpose of enabling Liebman Breweries to own and control the street for its own business, and that the agreement was unlawful and constituted waste of city property. The court of appeals held, three judges dissenting, that the complaint stated a cause of action.

The court stated that the complaint read in connection with the minutes of the Board of Estimate, upon which the board acted, bear out the allegations of the complaint that the city's action was unlawful. The minutes of the Board of Estimate disclosed that the board acted upon reports of its chief engineer. His report stated that the purpose of closing this street was to permit the release of the city's interest to the abutting property owner so that the abutting property owner could have the exclusive use of the area for necessary parking.

The power with respect to the discontinuance of city streets is plenary and may be exercised directly by the legislature or delegated by it to a municipal corporation. *Fearing v. Irwin*, 55 N.Y. 486 (1874). Such power was granted to the City of New York in subdivision *a* of § E 15–3.0 of the ADMINISTRATIVE CODE OF THE CITY OF NEW YORK. This section authorizes the city to close a street when deemed "necessary in order to more effectually secure and preserve the regularity and uniformity of the streets therein, or where other public necessity requires the closing." The complaint was sustained on the premise that the acts of the city were beyond its powers as provided for in this section and were therefore illegal.

1. When may a taxpayer bring an action to restrain a municipal corporation from acting?

Section 51 of the GENERAL MUNICIPAL LAW of New York authorizes a taxpayer to sue to prevent waste or injury to the property of the municipality and in addition to prevent an official illegal act. *Bauer v. City of Niagara Falls,* 262 App. Div. 938, 29 N.Y.S. 2d 448 (1941). Prior to the enactment of this section, no cause of action could be maintained by a general taxpayer unless specifically injured. *Morse v. Ereth,* 273 App. Div. 938, 80 N.Y.S. 2d 321 (1948). This in effect precluded all taxpayer suits because if the plaintiff could only sue when specifically injured his suit could not be on behalf of all the taxpayers which is the gist of such suits. See MCQUILLEN, MUNICIPAL CORPORATIONS § 52.16 (3d ed. 1951).

In an action under § 51 of the GENERAL MUNICIPAL LAW the taxpayer must allege and prove something more than mere waste. *Tooley v. Wilna,* 148 Misc. 611, 266 N.Y.Supp. 177 (Sup.Ct. 1933). The taxpayer must show (a) that waste or injury would follow from the illegal act, or (b) where such waste or injury to municipal property is not involved, that the act would imperil public interests, or (c) is calculated to work public injury, or (d) that fraud or collusion exists, or (e) that there is a usurpation of powers not granted. In *Brill v. Miller,* 140 App. Div. 602, 125 N.Y. Supp. 865 (1910), the court sustained a taxpayer's action to prevent the approval of building plans not in conformity with the building code of the city, although such approval would cause no waste or injury to property or funds of the city.

The courts, however, will not interfere at the suit of a taxpayer to restrain a municipality from entering or carrying out a contract simply because it appears unwise. *Talcott v. Buffalo,* 125 N.Y. 180, 26 N.E. 263 (1891). In following this principle the courts have held that a taxpayer cannot bring a suit to challenge a determination by a city that a certain area is substandard. *Kaskel v. Impellitteri,* 306 N.Y. 73, 115 N.E. 2d 659 (1953). Nor may a taxpayer maintain an action to restrain a sewer connection with the sewer of another city. *Kelley v. Miller,* 78 Misc. 584, 139 N.Y. Supp. 991 (Sup. Ct. 1912).

2. When are the acts of a municipal corporation illegal?

A municipal corporation acts pursuant to statutory power. When a municipality transcends this power and does an act which it is not authorized to do the act is illegal. In some cases the act is illegal because the power to perform the act has never been delegated to the municipality by the legislature. In other instances the power to perform the act is delegated provided the purpose for which the power is being used is an approved purpose. Therefore, whether a particular act is illegal or not often depends on the purpose for which the act is done. If the purpose of the act is to benefit the city, and a private individual is also incidentally benefited, the complainant has no cause of action. *Matter of Murray v. LaGuardia,* 291 N.Y. 320, 52 N.E. 2d (1943). If the purpose accomplished by the act could not benefit the city, or the benefit to the city was only incidental, then a cause of action lies at the instance of a taxpayer.

A case almost directly in point with the principal case and the above conclusions is *Denihan Enterprises, Inc. v. O'Dwyer,* 302 N.Y. 451, 99 N.E. 2d 235 (1951). A contract was entered into between the City of New York and an insurance company. The city was to acquire property by condemnation proceedings and then to offer a lease of it at a public sale. The buyer of the property was to be the tenant and the city was to be the lessor. The plaintiff alleged facts to show that the primary benefit of the contract would be for private interests and the contract was therefore illegal. The court sustained the complaint. The *Denihan* case and the principal case both involve preconceived plans to take property by condemnation proceedings for the benefit of private interests. However, in the *Denihan* case the property that was taken was private property, while in the principal case public property was taken. Except in this respect the cases are the same and the result should be the same.

3. May the courts look at the purpose of the municipality's act to determine its legality?

Judge Desmond, dissenting in the principal case, states, "since the closing of a public street is a legislative function, this complaint states no cause of action. No citizen or taxpayer can require the courts to decide whether the legislative decision is prudent or in the public interest or whether the legislators' motives are base or good. Intrusion of our courts into this legislative domain is unprecedented, contrary to settled public policy and not protective of any private right. . . .

"For more than 60 years *(Matter of Mayor of City of New York (Deering),* 28 App. Div. 143, affd. 157 N.Y. 409) it has been settled that on closing a street, 'The city of New York, as owner of the land, may use it for corporate purposes, or, unless it is required for such use, it may sell or dispose of it in the same way as an individual owner might do' (28 App. Div. 153). . . ." *Stahl Soap Corporation v. City of New York,* 5 N.Y. 2d 200, 206, 208, 156 N.E. 2d 443, 445, 446, 182 N.Y.S. 2d 808, 811, 813 (1959).

It is settled law in New York that the courts may not inquire into intent and motive of the legislature. And it has been held that whether or not a proposed condemnation proceeding is for a public purpose is a judicial question. *Matter of Deansville Cemetery Assn.,* 66 N.Y. 569 (1876); *Pocantico Water Works Comp. v. Bird,* 130 N.Y. 249, 29 N.E. 246 (1891); *Matter of Niagara Falls and Whirlpool Ry. Co.,* 108 N.Y. 375, 15 N.E. 375 (1888). The court has held that a taxpayer cannot dispute the conclusion of a public officer that a portion of a city is substandard and unsanitary. To do so would only substitute the court's opinion for that of the official body. This is a question that involves practical judgment and sound discretion. *Kaskel v. Impellitteri,* 306 N.Y. 73, 80, 115 N.E. 2d 659, 662 (1953).

Courts will not impute non public motives to the acts of the legislature or municipal bodies clothed with legislative powers. *Matter of City of New York,* 217 N.Y. 45, 111 N.E. 266 (1916). If a given act of legislation is not forbidden by express words, or by necessary implication, the judges cannot listen to a suggestion that the professed motives are not the real ones. Thus where the law or charter confers upon the city council, or local legislature, power to determine upon the expediency or necessity of measures relating to the local government, their judgment upon matters thus committed to them, while acting within the scope of their authority cannot be controlled by the courts. The decision of the proper corporate body is final and conclusive unless it transcends its powers.

However, intent and motive should not be confused with purpose. The words are not synonymous. Acts may be done with an intent to promote a proper purpose and yet the intended act may be wholly outside the purpose for which the power to act is given. In the present case motive is not in issue. The dissenting opinion has confused motive with purpose. The precise question is, can the city use the power conferred upon it by the legislature for this particular purpose? If the answer is no, clearly as the court of appeals has held, its act would be illegal.

T. P.

CONSTITUTIONAL LAW—DENIAL OF SUSPENSION OF INTEGRATION

In September of 1958 the Supreme Court of the United States in a unanimous decision blocked the ''delaying tactics'' of the state of Arkansas by refusing to grant a two and one-half year postponement of racial integration in the Little Rock, Arkansas public school system. *Cooper v. Aaron* 358 US 1.

This decision was the culmination of a year of tension and confusion for the School Board of Central High School in Little Rock. The opening day of classes at Central High in September of 1957 found the school board occupying an untenable position.

In May of 1954 the Supreme Court had declared that racial segregation in the public schools of a state was a denial of the equal protection of the laws and thus enjoined by the 14th amendment. *Brown v. Board of Education* 347 US 483 (1954). Exactly one year later the Court, in an attempt to ease the application of its desegregation ruling, decided that once a start had been made toward racial desegregation the federal courts might grant additional time to carry out integration plans provided that such extensions were necessary and consistent with good faith compliance. *Brown v. Board of Education* 349 US 294 (1955). This decision was simply a realistic attempt by the Court to achieve a workable compromise between the firmness of the 1954 *Brown* ruling and the mechanical problems of operating desegregated public schools.

The School Board pursuant to the mandate to desegregate had designed a plan of integration which was to commence in September of 1957 and to be completed by 1963. Soon after this plan had been announced the school board discovered that its proposals were opposed by both sides; the plan was violently attacked by not only the State of Arkansas, but also by certain negro groups. Dissatisfied negro plaintiffs were frustrated in their attempts to obtain more rapid integration by the federal court rulings in *Aaron v. Cooper,* 143 F. Supp. 855 (E.D.Ark. 1956) affirmed, 243 F. 2d. 361 (8th Cir. 1957). This plan also had to be protected by injunction against the Governor of Arkansas and the state national guard when they forcibly prevented the attendance of colored students at Central High School in Little Rock in September of 1957. *Faubus v. United States* 156 F. Supp. 220, (E.D.Ark. 1957) affirmed, 254 F. 2d. 797 (8th Cir. 1958).

Recognizing that mob violence, the presence of federal troops (sent by the President of the United States and later replaced by federalized national guardsmen) and other manifestations of opposition completely disrupted the educational functions of the high school, the board, in reliance upon *Brown II* petitioned a lower federal court in February of 1958 for permission to suspend the desegregation process until a more favorable climate appeared. It requested that the negro students in attendance at the school be returned to segregated schools and that the boards' integration program be postponed for a two and one-half year period. This relief was granted by the district court in *Cooper v. Aaron,* 163 F. Supp. 13 (E.D.Ark. 1958). The court of appeals for the eighth circuit reversed the lower court in 257 F. 2d. 33 (8th Cir. 1958). The United States Supreme Court granted certiorari upon petition by the school board and affirmed the court of appeals. 358 US 1.

In answer to petitioners' prayers for delay, the Court in *Cooper v. Aaron* said,

> "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. Thus law and order are not to be preserved

by depriving the Negro children of their constitutional rights." 358 US 1 at 16.

The Supreme Court, although sympathizing with the frustrating position confronting the school board and fully recognizing the board's undoubted good faith compliance with the requirements of *Brown I,* nevertheless rejected emphatically the board's request for delay.

Actually, what the Court did in its opinion was to reemphasize fundamental constitutional principles. In essence, the Court told the school board that . . . "they stand in this litigation as agents of the state." 358 US 1 at 16. Furthermore, the Court explained that the prohibitions imbodied within the 14th amendment extend to all actions of the state denying equal protection of the laws, regardless of the nature of the state agency taking the action. This is settled law obtained from such landmark decisions as *Strauder v. West Virginia,* 100 US 303 (1849) (statute prohibiting colored jurors), *Shelley v. Kraemer,* 334 US 1 (1948) (judicial enforcement of racial restrictive covenant), *Smith v. Allwright,* 321 US 649 (1943) (political party prohibition of Negro voters in primary elections), and *Buchanan v. Warley,* 245 US 60 (1917) (racial zoning ordinance).

The opinion in *Cooper v. Aaron, supra* necessarily dealt with the constitutional issues raised by Governor Faubus and the Legislature of Arkansas. They asserted that state officials had no duty or responsibility to obey federal court orders which were based upon the *Brown* decision and, more specifically, that they were not bound by the Court's interpretation of the 14th Amendment in *Brown I.* Almost by the way of dictum, the Supreme Court disposed of these contentions of Arkansas. The justices referred the government of Arkansas to the very cornerstone of our constitutional law, namely, *Marbury v. Madison,* 1 Cranch 137 (1803). The Court, in the exercise of its function of judicial review obtained in that notable decision, declared that . . .

> "the interpretation of the 14th amendment enunciated by this court in the Brown case is the supreme law of the land, and Article VI of the Constitution makes it a binding effect on the States . . ." 358 US 1 at 18.

Actually the Court said very little to the Little Rock School Board, the petitioners in *Cooper,* but rather directed most of its remarks to the Governor and State of Arkansas. The Court was fully aware of the background against which the board's delay request was formed and registered their disapproval with a verbal attack upon the State of Arkansas for its part in the lawless resistance to the Supreme Court's desegregation order. As Justice Frankfurter expressed in his concurring opinion, ". . . it (Arkansas) is legally and morally before the court." 358 US 1 at 22.

Racial segregation in public education was firmly established in this country prior to the momentous Brown decision. The prevailing rule prior to 1954 has been aptly described as follows:

> "Equality of rights does not mean identity of rights and does not involve the necessity of educating the children of different races in the same school where separate but equally advantageous schools are provided." 10 American Jurisprudence 905.

In one of the earliest decisions by the federal courts involving segregated public education, the fundamental rule that "equality of rights does not mean identity of rights" was stated in Bertonneau v. Board of Directors, 3 Fed. Cas. (294, 296 (No. 1361)) (C.C.D., La. 1878). Similar decisions were handed down by an Ohio Circuit Court in *U.S. v. Buntin,* 10 Fed. 730, (C.C.S.D. Ohio 1882) and by a California Circuit Court in *Wong Him v. Callahan,* 119 Fed. 381 (C.C.N.D. Calif. 1902).

But it was *Gong Lum v. Rice,* 275 U.S. 78 (1927) which gave the United States Supreme Court the first real opportunity to consider specifically the question of racial segregation in public schools in the light of the equal protection clause of the 14th amendment. In *Gong Lum,* the Court determined that separate but equal educational facilities and the classification of students by color was constitutional. In support of this conclusion the Court indicated that public school regulation was a matter of discretion among state authorities, bowing to the established principle that public education was chiefly a state function.

It is interesting to note that to fortify its position in *Gong Lum* the Court referred to two early New York segregation decisions, in addition to the classic *Plessy v. Ferguson* 163 US 537 (1896) doctrine of ''separate but equal'' facilities. *People ex rel King v. Gallagher,* 93 NY 438, 45 Am. Rep. 232 (1883) and *People ex rel Cisco v. School Board,* 161 NY 598, 56 N.E. 81, (1900) were mentioned as supporting the establishment of separate schools for colored children. The *King* decision protected the Common School Act of 1864, (chap. 555, Laws of 1864), which authorized cities and villages of the state to segregate colored children in separate schools, against attack under the equality clause of the 14th amendment and the State Civil Rights Act of 1873 (chap. 186, Laws of 1873). The *Cisco* case did the same thing as the *King* case but for the Consolidated School Law (chap. 556, Laws of 1894) which also authorized the maintenance of separate racial schools.

Despite the prohibitions of the 14th amendment, discrimination by the states is sometimes sanctioned by the federal government. Discrimination, for instance, against corporations and aliens has been permitted in many circumstances. However, such discrimination is always very narrowly defined and is allowed only if it preserves the individual's rights to due process and equal protection of the laws.

Here, the problem seems to be one of classification by the state legislatures. The equality clause of the 14th Amendment allows the states the power to classify in the administration of their laws if the purpose to be accomplished is within the permissible functions of the state and also if the classification has a reasonable relation to that purpose.

> ''A classification having some reasonable basis does not offend against that clause (equal protection) merely because it is not made with mathematical nicety or because in practice it results in some inequality.'' *Lindsley v. Natural Carbonic Gas Co.,* 220 US 61 (1910).

It was not until the *Brown* decision in 1954, that the judiciary recognized that classification of public school children on the basis of color was a denial of equal protection of the laws. It took the Supreme Court of the United States eighty-six years after the enactment of the 14th amendment in 1868 to determine that equality of rights as expressed by that amendment *does* mean ''identity'' of rights when applied to public education. A brief analysis of the evolution of the equality clause as it pertains to public education finds the early court interpretation of equality in the 14th amendment to be ''substantially equal'' as in the case of *People ex rel Dietz v. Easton* 13 Abb. (N.Y.) Pr. (n.s.) 159 (1872). Later, we see the Court in such cases as *Gong Lum* avoiding the issue by claiming that public education was mainly a state function and adhering to the ''separate but equal'' interpretation laid down in *Plessy*. And finally in 1954 the understanding of equality becomes identity in *Brown*. Against this history, is it not surprising that the Court in the recent *Cooper* decision felt strongly about any attempts by the states to suspend or circumvent desegregation in state-supported schools?

As cogently expressed by Justice Frankfurter in *Cooper v. Aaron, supra:*

> ''. . . to accede to the Boards' request, on the basis of the circumstances that gave rise to it, for a suspension of the Boards' non-segregation plan, would be but the beginning of a series of delays calculated to nullify this courts' adamant decisions in the Brown case. . . .'' 358 US 1 at 26.

Plainly, the ''equal and separate'' principle of the *Plessy* case as it had application to public education has succumbed to the ''equal and identical'' principle of the *Brown* decision. However, the *Plessy* doctrine, although seriously weakened, still maintains a tenacious hold upon certain areas of public accomodations and facilities. Nevertheless, *Brown* and its supplementation by the recent decision in *Cooper* point the way to complete equal protection. These decisions show the United States Supreme Court capable of giving responsible moral leadership and education to achieve that result by its recognition of the fact that, ''Local customs however, hardened by time, are not decreed in heaven.'' 358 US 1, 25.

D.D.D.

CONSTITUTIONAL LAW — EQUAL PROTECTION —PARENTS' RIGHT TO REJECT INFERIOR EDUCATION IN RACIALLY SEGREGATED SCHOOLS

The Board of Education of the City of New York cannot constitutionally invoke criminal sanctions against Negro and Puerto Rican parents who refuse to send their children to schools which are *de facto* segregated and against which a discriminatory pattern of teacher staffing is allowed to exist. This was decided recently in the Children's Court Division, Domestic Relations Court of the City of New York. *In the Matter of Charlene Shipwith and Another,* 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958).

The Board filed a petition charging the respondents with neglect for refusing to send their children to either the assigned schools or to acceptable private schools.

The respondents' defense was that the children attending the schools in question are denied equal educational opportunities in violation of the "equal protection of the laws" guaranteed by the fourteenth amendment of the Constitution of the United States.

The Board of Education contended that the constitutional objections were not properly before the court but must be addressed to the Commissioner of Education under section 310 of the Education Law. After a thorough consideration of this point, the court concluded that it had the duty to consider upon the merits the constitutional issues presented by the parents in defense of their conduct.

The statistical data and other evidence produced clearly indicated that *de facto* segregation existed in the junior high schools of New York City. However, since there was no indication that this situation resulted from anything but residential segregation not attributable to any state action, this defense, by itself, was held inadequate. *Henry v. Godsell,* 165 F. Supp. 87 (E.D.Mich. 1958); *Holland v. Board of Public Instruction,* 258 F.2d 730 (5th Cir. 1958).

The data also indicated a city-wide pattern of discrimination against schools with a predominately non-white student body. For example, in "X" schools (85% or more Negro and Puerto Rican population), the number of teaching vacancies was 49.5%. In "Y" schools (85% or more white students), the number of vacancies was 29.6%. These vacancies are filled by the principals securing substitute teachers whose academic qualifications are inferior to those of regularly licensed teachers.

The respondents called, as expert witnesses, Dr. Wayne B. Wrightstone and Dr. Kenneth B. Clark, noted educators, psychologists, and social scientists. The court gave heavy emphasis to their opinions based on research and sociological studies. It was agreed that the quality of teaching is an important consideration in determining the adequacy of education. As the child is disadvantaged more by other factors, such as separation by race, his need for skillful teaching increases. It might be pointed out that the trend to rely upon the expert testimony of "social scientists" has been objected to in some quarters when it appeared in the United States Supreme Court.

Some effort to improve the teaching and curriculum was evidenced. However, no power was given by the Board to transfer regularly licensed teachers once appointed. Furthermore, there was no evidence that a procedure had been adopted whereby the imbalance in the assignment of regularly qualified teachers could reasonably be expected to be overcome. Therefore, the court held that the parents were justified in refusing to accept an unconstitutional condition which exists in the schools to which the Board has assigned their children.

In the early case of *Ex parte Virginia,* 100 U.S. 339 (1880), it was held that an action by a judge on his own impulse and without authority from the law of the state was state action. "A State acts by its legislative, executive, or its judicial authorities. It can act in no other way." 100 U.S. 339 at 347. However, as the *Civil Rights Cases,* 109 U.S. 3 (1883), indicate, there must be state action—not purely private conduct.

In *Nixon v. Condon,* 286 U.S. 73 (1932), it was established that private groups are subject to constitutional restraint when they perform functions of governmental character in matters of great public interest.

As indicated in the majority and minority opinions in *Dorsey v. Stuyvesant Town Corporation,* 299 N.Y. 512, 532–33, 538–42, 87 N.E. 2d 541, 549–50, 553–55 (1949), the concept of state action has expanded so that the fourteenth amendment is no longer satisfied by a mechanical finding that the discriminatory conduct was perpetrated by legislative, judicial, or executive officers of the state. The definition of private conduct in this context has been tightened up and restricted, while the term state action has been vitalized and enlarged.

In the principal case, the teachers themselves, over a period of time, were permitted to establish the discriminatory pattern. The Board, which had power over the assignments of regularly licensed teachers, permitted the teachers to exercise the power of assignment insofar as their teaching in "X" schools is concerned. The Board is bound by the acts of its servants, and is therefore accountable for any denial of constitutional rights resulting from those acts.

Equal protection in the field of education began with the case of *Plessy v. Ferguson,* 163 U.S. 537 (1896), in which the "separate but equal" doctrine was introduced. Educational facilities could be separate so long as they were equal.

In *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337 (1938), it was held that to require attendence at a law school out of state was not equal treatment. This was true even if the school in the neighboring state were as good as the one in Missouri. For one intending to practice in a particular state, there are special advantages in attending a law school there.

That equal facilities mean truly equal was further demonstrated by *Sweatt v. Painter,* 339 U.S. 629 (1950). There, equal physical facilities were held insufficient. The intangible benefits must also be duplicated, e.g. prestige, standing, body of alumni. The decision in this case clearly suggested a re-examination of the *Ferguson* case, supra.

In 1954, the Supreme Court, in *Brown v. Board of Education,* 347 U.S. 483 (1954), held that unless there was equal access to the same facilities, there was no equal protection. Segregation is not equal protection.

As was pointed out in the principal case, it should not require the *Brown* case to indicate to the petitioner where its constitutional duty lies. The controlling principle of the *Ferguson* case still applies. There is nothing in the *Brown* case to suggest that where segregation exists, apart from any state action, the school boards are then free to condone discriminatory practices on the part of its teaching staff. Indeed the inference is clearly to the contrary.

The result may, perhaps, seem contradictory in that the Board is required to achieve equality in a situation inherently unequal. However, the Board is only accountable, in this case, for the active discrimination practiced by its teachers. The Board must account for any unconstitutional conditions within its power to correct.

Any solution is likely to require some added expense. *Jaffe v. Board of Education,* 265 N.Y. 160, 192 N.E. 185 (1934), indicates this is no ground for failure to correct the situation. There it was held that the statute authorizing the appointment of substitute teachers temporarily, in an emergency situation created by the death or removal of a regular teacher, could not be stretched to cover the appointing of large numbers of substitute teachers and assigning them to classes for which no regular teacher had been appointed. Likewise, the fact that hardship will result for some of the teaching force is no grounds for inaction by the Board. *Davis v. Board of Education,* 263 App. Div. 369, 33 N.Y.S.2d 311 (1942).

The court expressly points out that how the existing situation is to be remedied, and when, are not decided. It is suggested that possible solutions include compulsory assignment of experienced teachers to under-staffed schools for a period of years, the paying of a special bonus to teachers who accept such assignments, or by providing additional services to such schools to make them more attractive to teachers. The court hastens to express its confidence that with enlightened leadership and determination a proper and satisfactory solution can be found.

This case clearly demonstrates that all the racial problems in the field of education are not confined to the southern states alone. The court points out to the petitioning School Board of the City of New York that other communities with more difficult problems and more painful adjustments have met their constitutional obligations and are working to achieve the constitutional guaranty of equal protection of the laws.

From the testimony in this case, it appears that the parents are attempting to provide whatever alternate education they can, although it may not meet the requirements of the EDUCATION LAW. The court while commending their course of conduct clearly states that these parents have the constitutionally guaranteed right to elect no education for their children rather than a discriminatorily inferior education. Their defense of a denial of equal protection due to racial discrimination resulting in inferior educational opportunities bars an adjudication of neglect. As long as this discriminatory situation is allowed to exist, the Board of Education has no moral or legal right to obtain an adjudication which would punish the parents, or deprive them of custody of their children for refusing to accept this deprivation of their constitutional rights.

A.H.F.

CRIMINAL LAW—IMMUNITY FROM PROSECUTION —PENAL LAW § 2447

On May 2, 1958, an attempt was made to assassinate Frank Costello. The appellant was called before the New York County Grand Jury on its inquiry into the crime and cited for contempt of court. *People v. Costello,* 6 App. Div. 2d 385, 178 N.Y.S. 2d 432 (1958).

''While he was in the hospital for treatment of injury resulting from the attack on him, the police, searching his clothing, had found in his pocket a paper containing notations of various amounts of money connected with ''casino wins'' and ''slot wins'' and payments to individuals.

''In addition to the direct facts of the crime, the witness was asked questions concerning this paper and its contents on the theory of the District Attorney that the paper and its notations could have some bearing on a conspiracy to assassinate the witness.

''Appellant refused to answer these questions on the ground they would be self-incriminating; he was directed by the foreman of the Grand Jury to answer under conditions which adequately conferred immunity under New York law from subsequent criminal prosecution. (Penal Law, § 2447, subd. 2.) Before the Grand Jury, the witness asserted that he was then under State and Federal investigation and that previous testimony given by him before New York grand juries had been turned over to Federal authorities.

''In the proceeding before the Court of General Sessions to compel answers to the questions, he asserted the danger of his exposure to Federal prosecution. The court directed the answers and, on the failure of the witness to comply, entered an order punishing him for contempt, which is here reviewed.'' People v. Costello, 6 App. Div. 2d 385, 178 N.Y.S. 2d 432 (1958).

The rule has long been established, both in the New York courts and the Supreme Court of the United States, that an immunity statute which confers immunity on a witness under investigation is valid if it gives complete protection to the witness against its own processes. As the court ruled in *Dunham v. Ottinger,* 243 N.Y. 423, 154 N.E. 298 (1926), the statute does not purport to give and could not give protection against such a prosecution. It does give ample protection against the use of such testimony in our own tribunals and it is well established that this is a sufficient immunity; that all that a state is required to or can do is to give immunity against its own processes and, if it has done that, it has satisfied the requirements of the Constitution. The facts in the above case, although different, presented once again the question of immunity. In the case in question the witness refused to testify after he had been granted immunity out of fear of federal prosecution. In *U.S. v. Murdock,* 284 U.S. 141 (1931), the Supreme Court of the United States reiterated the rule. In this case, the defendants reported federal income tax returns which were in question. He refused to answer, after he had been given immunity, because of fear of state prosecution for evasion of state income tax laws. The court said that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination.

In *Matter of Herlands,* 204 Misc. 373, 124 N.Y.S.2d 402 (Sup. Ct. 1953), the witness before the grand jury, after being granted immunity, refused to answer questions on his gambling operations because of probable prosecutions in New Jersey and by the federal government. The court stated that it is a well established rule that a witness cannot refuse to testify because the immunity afforded does not extend to all possible prosecution in other jurisdictions. All that a state is required to do, or can do, is to give protection against the use of the witness' testimony in its own courts. *Matter of Greenleaf,* 176 Misc. 566, 28 N.Y.S. 2d 28 (Ct. of Gen. Session 1941) held that the immunity granted would be binding in all parts and upon all agencies of our state. Here the witness refused to answer because of fear that he would be prosecuted in the county where the alleged crime took place.

The defendant in the case at bar claimed that on previous occasions he had testified under a grant of immunity and that his testimony had been turned over to federal authorities as evidence to be used against him in a federal prosecution. The doctrine of *Knapp v. Schweitzer,* 357 U.S. 371 (1957) answers this contention. There the court held that if a federal officer should be a party to the compulsion of testimony by state agencies, the protection of the Fifth Amendment would come into play. Such testimony is barred in a federal prosecution. The witness in this case refused to answer under a grant of immunity given by the state grand jury because the U.S. Attorney for the Southern District of New York had made public announcement of his intention to co-operate with the district attorney (respondent) of the state in the prosecution of criminal cases in the field of the subject matter out of which petitioner's commitment arose. The defendant, Mr. Costello, in the case at bar, makes no such allegations of conspiracy between the two agencies of the federal and state governments and therefore the doctrine of *Knapp v. Schweitzer, supra,* does not apply.

The grant of immunity given by the proper authority does not apply to the crime of perjury committed while under protection of the immunity statute. *People v. Reiss,* 280 N.Y. 539, 20 N.E.2d 8 (1939) held that immunity doesn't extend to the new offense of perjury. Immunity is granted to any prosecution for crimes disclosed by the testimony but not for the crime of perjury committed in the giving of the testimony. *People v. Berger,* 197 Misc. 915, 100 N.Y.S. 2d 278 (Sup. Ct. 1950).

A conviction for criminal contempt was upheld in *People v. Saperstein,* 2 N.Y. 2d 210, 140 N.E. 2d 252, 159 N.Y.S. 2d 160 (1957). In that case the defendant refused to testify to whom he had been talking on the telephone (which had been tapped under court order) after he had been granted immunity. The immunity is statutory and protects a witness from prosecution for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, the witness gave answers or produced evidence. *Matter of Costello v. Schurman,* 6 Misc. 2d 66, 136 N.Y.S. 2d 835 (Sup. Ct. 1957), *aff'd. sub nom. People v. Costello, supra.*

The defendant here also claims that the immunity granted to him was not broad enough to grant him complete immunity. According to petitioner's own brief to the appellate division, containing the minutes of the grand jury hearing, he was afforded complete immunity as to any testimony which he might give. After declaring his constitutional rights to refuse to answer, the district attorney asked the foreman of the grand jury to grant him immunity; Mr. Costello still refused to answer, whereupon he was told:

> ''You appreciate, do you not, an answer under these circumstances, pursuant to a direction from the Grand Jury, will automatically, under the law, confer immunity upon you from prosecution from whatever crimes may be revealed by this testimony? You understand that and you still refuse?'' Brief for Appellant pp. 8–9. *People v. Costello* 6 App. Div. 385, 178 N.Y.S. 2d 432 (1958).

The defendant still refused to answer even though he was granted complete immunity. To force disclosure, the immunity must be so broad that the risk of prosecution is ended altogether. *Matter of Doyle,* 257 N.Y. 244, 177 N.E. 489 (1931). There, the defendant was called before the legislature, which was investigating the corruption of public officials in the New York area, and given immunity for bribery but not for the crime of conspiracy to bribe. In *People v. De Feo,* 308 N.Y. 595, 127 N.E.2d 592 (1955), the majority opinion stated the same rule. There, the defendant was called as a witness in an investigation to determine whether a certain corporation doing insurance business was splitting commissions received on policies with certain labor union officials in violation of N.Y. PENAL LAW § 380 and the N.Y. INSURANCE LAW § 5, 13. The defendant was not informed of his rights as a prospective defendant and did not claim his immunity privilege. He was granted immunity for the crime of conspiracy and bribing labor officials. The court said that although a grand jury is a competent authority to confer immunity and the immunity shall be complete, the limitation of the immunity attempted to be conferred on defendant in exchange for incriminating testimony was not co-extensive with, and as broad as, his constitutional privilege. The immunity granted here was incomplete. The facts of the Costello case do not come under this rule. He was granted complete immunity.

Mr. Costello next raises the fact that the evidence used in the questioning bringing about his contempt citation was illegally taken from his pocket while he was at the hospital. In a prosecution in a state court for a state crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure, *Wolf v. Colorado,* 338 U.S. 25 (1947). The record books of a physician were seized by officers who entered his office without a warrant, and names taken from the books were used to obtain witnesses and ultimately a conviction against the physician. *Rochin v. California,* 342 U.S. 165 (1952) is a limitation on the above rule limiting the illegal search and seizure to property and not allowing assaults on the person of the defendant in order to extract the evidence from the defendant's stomach. There was no assault on Mr. Costello.

As the court said in *People v. DeFeo, supra,* § 2447 of the N.Y. PENAL LAW should be strictly adhered to. Whenever the witness is in doubt as to whether the immunity granted is as extensive and as broad as his constitutional privilege, he always has the opportunity to refuse to answer until the grant of immunity is submitted to a court of competent jurisdiction. With this safeguard the witness is always protected from a mistake of the grand jury in granting him limited immunity.

R. J. P.

DOMESTIC RELATIONS — CUSTODY OF MINOR CHILDREN — COURTS POWER AS *PARENS PATRIAE*

The Court of Appeals in a 4–3 decision recently held in *Matter of Jewish Child Care Association of New York,* 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959), that foster parents, not having legal custody, were not entitled to the custody of an infant, as against the institution, who had boarded the child with the respondents with the intent to eventually return the infant to the mother. The petitioner in this habeas corpus proceeding is an authorized institution, which receives children by commitment from the Department of Welfare of the City of New York. It seeks redelivery of a child, now five and one-half years old, placed in the home of respondents for boarding care four and one-half years ago.

The infant, Laura Newberger, born out of wedlock when her mother was seventeen years old, was turned over to the Welfare Department, which in turn commended her welfare to the petitioner, Jewish Child Care Association of New York, hereinafter called Child Care. Its main purpose is to provide temporary care for such infants until the parents are able to resume their responsibilities. While some of the children are placed in a cottage plan institution, the majority are placed in boarding or foster homes.

Pursuant to this system of placement, Laura was turned over to Mr. and Mrs. Sanders, the appellants, when she was thirteen months old. She remained there for approximately three and one-half years, when Child Care demanded her return. Having been refused, they began this action. Child Care based its decision on the conduct and attitude of the foster parents, not only in their attempts to adopt Laura, contrary to the original understanding and agreement of the parties, but also because of the emotional entanglement between foster parents and child. Prior to this action, the foster parents had signed an agreement acknowledging their relation to the child as that of boarding home parents only. It was expressly understood by all parties that return to the parent is contemplated, and further, that the parent is unwilling to surrender the child for adoption. The procedure is governed by the N.Y. SOCIAL WELFARE LAW Art. 6 and the NEW YORK CITY ADMINISTRATIVE CODE Ch. 24.

Under these statutes, Child Care has the legal right to the custody of the child. There is no doubt that they have a right to maintain such an action (N.Y. SOCIAL WELFARE LAW, § 383(2)), or that such action is the proper form of remedy. *Finlay v. Finlay,* 240 N.Y. 429, 148 N.E. 624 (1925).

With such a legal status, Child Care has a twofold duty; to protect the parental rights while promoting the best interests of the child. The parental right is a fundamental right of natural law. *People ex rel. Kropp v. Shepsky,* 305 N.Y. 465, 113 N.E.2d 801 (1953); *People ex rel. Portnoy v. Strasser,* 303 N.Y. 539, 104 N.E. 2d 895 (1952); *People ex rel. Herzog v. Morgan,* 287 N.Y. 317, 39 N.E. 2d 255 (1942); GROSSMAN, NEW YORK LAW OF DOMESTIC RELATIONS §§ 130, 131, 133 (1947).

The modern leading case in New York is that of *People ex rel. Portnoy v. Strasser, (supra),* wherein the court of appeals said, "no court can for any but the gravest reasons, transfer a child from its natural parent to any other person . . . the right of a parent to establish a home and bring up children is a fundamental one and beyond the reach of any court." (303 N.Y. 539, 542, 104 N.E. 2d 895, 896 (1952)). Foreign court divorce and custody proceedings are not binding. *Matter of Bachman v. Mejias,* 1 N.Y. 2d 575, 136 N.E. 2d 866, 154 N.Y.S. 2d 903 (1956); *People ex rel. Herzog v. Morgan, (supra).* A parent is entitled to test a judgment of commitment collaterally and "without delay", and is not required to await the outcome of the pending commitment proceedings. *People ex rel. Riesner v. N.Y. Nursery and Child's Hospital,* 230 N.Y. 119, 129 N.E. 2d 341 (1920).

Nothing short of the most unusual circumstances warrants the granting of custody to one other than a parent of the children. GROSSMAN, N.Y. DOMESTIC RELATIONS LAW § 133 (1947). "The custody of an infant should be awarded to a natural parent in preference to strangers unless there is a compelling reason to the contrary." GROSSMAN, N.Y. DOMESTIC RELATIONS LAW § 133 (1947). The rule is most strongly expressed in *People v. Cobb,* 196 Misc. 961, 94 N.Y.S. 2d 616 (Sup.Ct. 1949), where the court declares that the natural right of a parent to custody cannot be interfered with by law merely to better the moral and temporal welfare of the child. All these authorities recognize that abandonment or unfitness of the parent substantially diminishes the parental rights.

It is firmly established that a different rule governs where the controversy arises between parent and parent, than where the controversy is between parent and non-parent. In the former situation, "the welfare of the ward is the paramount concern of the court and nothing done, or attempted to be done, by anyone else, affects the courts power to decide what is for the best interests of the children. (*Waring v. Waring,* 100 N.Y. 570, 3 N.E. 289 (1885))." GROSSMAN, N.Y. DOMESTIC RELATIONS LAW § 131 (1947).

The primacy of the parental right may not be ignored, except where a non-parent has obtained legal or permanent custody of a child by adoption, guardianship or otherwise. The non-parent has the burden of establishing his claim and also the unfitness of the natural parent. *People ex rel. Fentress v. Somma,* 127 N.Y.S.2d 169 (Sup.Ct. 1953); see also *Application of Anonymous,* 10 Misc. 2d 1076, 170 N.Y.S. 2d 178 (Sup.Ct. 1958); *Caruso v. Caruso,* 175 Misc. 290, 23 N.Y.S. 2d 239 (Sup.Ct. 1940); *Application of Nisch,* 74 N.Y.S. 2d 620, (Sup.Ct. 1947); *but cf. People ex rel. Catholic Charities of Buffalo v. Hagstotz,* 177 N.Y.S. 2d 818 (Sup.Ct. 1952).

In collateral matters the United States Supreme Court has recognized this primary right of the parent as a natural, legal and constitutional right. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), *Meyers v. Nebraska,* 262 U.S. 390 (1923), *May v. Anderson,* 345 U.S. 528 (1953).

Child Care is the protector of these rights. Although the issue involved is the welfare of the child, it is the preservation of the parents' rights which, in this case, determines those best interests. It is not a question of superior rights as between Child Care and the foster parents. As the court of appeals said, ''What is essentially at stake here is the parental custodial right. Although Child Care has the present legal right to custody, (Social Welfare Law, § 383, subd. 2) it stands as against the Sanders, in a representative capacity as the protector of Laura's mother's inchoate custodial right and the parent-child relationship which is to be complete in the future.'' 5 N.Y. 2nd 222, 229, 156 N.E. 2nd 700, 703, 183 N.Y.S. 2nd 65, 70 (1959).

As against the protector of these rights the foster parents have no rights. The majority of the appellate division held that the foster parents have no standing to contest the determination of the trial term. 6 App. Div. 2d 698, 174 N.Y.S. 2d 335 (1958).

The foster parents assumed a grave responsibility in accepting the child for temporary care and preparing the child for the return to its home. This is the essence of their function. Assisted by Child Care workers, ''it is the function of the foster parents to assist in the proper orientation of the child so that it may be prepared and ready for its eventual return to its family.'' 5 N.Y. 2d 222, 229, 156 N.E. 2d 700, 703, 183 N.Y.S. 2d 65, 66 (1959). The foster parents, because of their emotional entanglement, have breached this trust. Such a matter is within the discretion of the supreme court, and rarely presents a question of law for the court of appeals. *People ex rel. Portnoy v. Strasser,* 303 N.Y. 539, 104 N.E. 2d 895 (1952); *Bunim v. Bunim,* 298 N.Y. 391, 83 N.E. 2d 848 (1949).

In determining whether there was an abuse of discretion, the court of appeals stated that the record clearly established that "The appellants have conducted themselves in a fashion inconsistent with their agreement and, indeed, diametrically opposed to their trust." 5 N.Y. 2d 222, 228, 156 N.E. 2d 700, 703, 183 N.Y.S. 2d 65, 69 (1959). The best interests of the child necessitated her placement in another environment where she would not be torn between her loyalty to her mother and her boarding home parents. This was the contention of Child Care, and the Department of Welfare, and was the view adopted by special term in its own independent exercise of discretion. 9 Misc.2d 402, 172 N.Y.S. 2d 630 (1957).

The dissenting opinions in the court of appeals lay stress on the absence of a desire or expression by the mother to regain custody for herself. As previously stated, except when adjudicated to be otherwise, it is only the unfitness of the parent which can overcome the primacy of the parental rights. The mere absence of affirmative acts showing concern cannot be the inference of abandonment or unfitness. The majority opinion sets up the requirement of a "clear showing," relying on the *Shepsky* and *Strasser* cases, to establish unfitness, and interests contrary to the welfare of the child as necessary to vitiate the parental right. It is to be protected from "direct and immediate incursion," as well as from "indirect and less proximate subversion." The record indicates the mother's intention to eventually resume her duties by her constant refusals to permit adoption.

Incidental to this main issue is the status of the mother. The infancy of the mother during any part of the proceeding is immaterial. *People ex rel. Spokas v. McCarthy,* 7 Misc. 2d 963, 164 N.Y.S. 2d 198 (Sup.Ct. 1957). Her past conduct is also immaterial. *People ex rel. Portnoy v. Strasser, (supra).* The future intent is controlling.

There remains the possibility of injury to the child, also stressed by the dissenting opinions in the court of appeals, which places great weight on the testimony of appellants' expert witness, a psychiatrist who described Laura, as "healthy, normal and well-adjusted." The expert testified as to Laura's best interests, contrary to the findings of special term and the Appellate Division. It might well be contended that a normal, well-adjusted child would be able to adjust to future changes. But more important, as the majority points out, "We may not indulge as assumption, or even harbour a doubt that Laura will not be properly cared for," 5 N.Y. 2d 222, 229, 156 N.E. 2d at 700, 703, 183 N.Y.S. 2d at 65, 70 (1959), and again, "the child's best interests necessitated her placement in another environment where she would not be torn between her loyalty to her mother and her boarding parents." 5 N.Y. 2d 222, 227, 156 N.E. 2d 700, 702, 183 N.Y.S. 2d 65, 68 (1959).

The mere existence of Laura in these circumstances presents questions of hardship which will always be present. It is the court's duty when presented with the problem to alleviate these hardships as far as possible.

However, as the court emphasized in *Bunim v. Bunim, (supra),* there is a difference between a child's pleasure and a child's welfare. As was said in the *Shepsky* opinion, "In no case may a contest between parent and non-parent resolve itself into 'a simple factual issue as to which [affords] the better surroundings, or as to which party is better equipped to raise the child.' *(People ex rel. Portnoy v. Strasser, supra,* 303 N.Y. 539, 542). And that is true even if the nonparent initially acquired custody of the child with the parents' consent. (See, e.g., *People ex rel. Beaudoin v. Beaudoin, (supra),* 126 App. Div. 505, 507, *aff'd.* 193 N.Y. 611, *cf., Matter of Bistany,* 239 N.Y. 19)." *People ex rel. Kropp v. Shepsky,* 305 N.Y. 465, 469, 113 N.E. 2d 801, 804 (1953). Again in the *Strasser* case the court held that disparity of physical aspects of homes would be material only upon conditions which were such as to make living in one as against the other harmful to the child. The superior material advantages of foster parents, who were of good standing in the community, with ample financial resources cannot prevail against the rights of the mother (even though unwed and living with her parents, of lower station), *Application of Anonymous,* 10 Misc. 2d 1076, 170 N.Y.S. 2d 178 (Sup.Ct. 1958).

The natural right of the parent will not be interferred with even to better the moral and temporal welfare of the child. *Caruso v. Caruso,* 175 Misc. 290, 23 N.Y.S. 2d 239 (Sup.Ct. 1940).

"Certainly, the Trial Justice was entitled to find that it would be in Laura's best interests to extricate her now from the emotional entanglement into which she has been plunged by the keen parental desire of the Sanders in which they involved themselves contrary to their own agreement and in violation of their trust." 5 N.Y. 222, 229, 156 N.E. 2d 700, 703, 183 N.Y.S. 2nd 65, 69 (1959). The appellants' mere *belief* that they can contribute more to the child's welfare than the mother and Child Care does not outweigh the imminent possibility of future damage or of the consequences of a more difficult situation arising in the future if these ties are permitted to be strengthened by the passage of time.

Having so reviewed the facts, the majority of the court found no abuse of discretion by the court at special term. Indeed, in such cases the Justice's decision is entitled to great weight. "The Special Term judge saw and heard the witnesses. He was face to face with the infants whose paramount interests were to be fostered. The factors that made his duty clear to him, can, at this distance be seen by us only, as it were, through a glass darkly." *People ex rel. Herzog v. Morgan,* 287 N.Y. 317, 322, 39 N.E. 255, 256 (1942). The question of custody is generally for the supreme court in its discretion, and it is rarely that any such determination can raise any question of law for the court of appeals. *Matter of Bachman v. Mejias, (supra), Bunim v. Bunim, (supra).* It is noted that the court of appeals did not explicitly pass upon the important issues which divided the appellate division. The dissenting opinion of Judge Dye declares, "This tragic result came about because of a mistaken notion that the courts are bound to accept an administrative policy of the Agency as controlling their determination rather than to exercise their own traditional power and authority in accordance with the evidence." 5 N.Y.2d 222, 230, 156 N.E.2d 700, 704, 183 N.Y.S. 2nd 65, 71 (1959).

The appellate division was sharply split on this point. The majority termed the statutes N.Y. SOCIAL WELFARE LAW, § 383(2) and NEW YORK CITY ADMINISTRATIVE CODE § 603–20 a valid exercise of the Legislature's reserve power over infants, as the ultimate successor of the crown, while the dissenting opinion assumed the position that the supreme court's sole "jurisdiction" may not be limited by legislative action.

In view of the ever increasing amount of social legislation and the growing importance of administrative law, the resolution of such a question would be a major contribution to the proper administration of this field of jurisprudence.

The recent case of *Matter of Mary I —— v. Convent of Sisters of Mercy in Brooklyn,* 200 Misc. 115, 104 N.Y.S. 2d 939 (Sup.Ct. 1951), held that the N.Y. SOCIAL WELFARE LAW cannot effect the inherent equitable powers of the court to arrange for the custody of children. In the earlier case of *People ex rel. Our Lady of Victory Infant Home v. Venniro,* 126 Misc. 135, 212 N.Y.S. 741 (Sup.Ct. 1925), the same principle was held applicable to the State Charities Law, § 303, the predecessor to § 383 of the N.Y. SOCIAL WELFARE LAW, but the court determined that the claimant's superior rights to custody, by virtue of the statute, determined the issue.

That the Legislature possesses the power as successor to the crown to function and legislate in its capacity as *parens patriae,* was asserted in *Matter of Brock,* 245 App. Div. 5, 11, 280 N.Y.Supp. 753, 760 (1935). There the court declared "The weight of authority indicates that the determination of such custody did not involve a jurisdictional question. It was not the subject matter of a conventional action or proceeding to which there were parties . . . (*Finlay v. Finlay,* 240 N.Y. 429, 433)."

"The determination as to who should have the custody of infants was a prerogative of the crown. The King deputized the Chancellor to act for him in exercising what was essentially an administrative or executive function. . . . His right to act did not arise by virtue of his office or as part of his extraordinary jurisdiction. It was derived by special authority from the King as *parens patriae.*" The Court also pointed out that appeals from cases involving infants went to the House of Lords, whereas others, for example those involving lunatics, went to the King's Bench, citing BISPHAM, EQUITY, [7th ed.], §§ 34, 542, 521, and STORY, EQ. JURIS., [14th ed.], § 1750.

After the Revolution, the Chancery powers descended to the chancery courts of the State of New York, and the court asserted that no legislation was needed to so vest the powers. However, the Court goes on to say, "It was however, subject to legislative power because the prerogatives of the Crown devolved upon the State; and these prerogatives, including the power as *parens patriae,* belonged 'exclusively to the legislatures of each state.' (3 Pom. Eq. Juris., [4th ed.], § 1304, footnote thereto, and cases cited, *Mormon Church v. United States,* 136 U.S. 156; *4 Kent Comm. 508,* note)." 245 App. Div. 5, 12, 280 N.Y.Supp. 753, 761 (1935).

The court of appeals in *Finlay v. Finlay, (supra),* spoke of the Chancellor as interfering "for the protection of infants, *qua* infants, by virtue of the prerogatives which belong to the crown as *parens patriae.*" (240 N.Y. 429, 433, 148 N.E. 624, 626). The argument was made in *Wilcox v. Wilcox,* 14 N.Y. 576 (1856) that the NEW YORK CONSTITUTION as it then existed, was the source of the supreme court's jurisdiction in law and equity, (Art. 6, § 3) and limits this power in that the legislature has the power to alter and regulate the jurisdiction of the court, (Art. 6, § 5). This authority has been followed by many cases; *People ex rel. Mayor v. Nichols,* 79 N.Y. 582 (1888), *People ex rel. Pruyne v. Watts,* 122 N.Y. 238, 25 N.E. 266 (1890), *Matter of Knowach,* 158 N.Y. 482, 53 N.E. 676 (1899), *Matter of Lee,* 220 N.Y. 532, 116 N.E. 352 (1917), *Matter of Bistany,* 239 N.Y. 19, 145 N.E. 70 (1924), *People ex rel. Keator v. Moss,* 6 App. Div. 414, 39 N.Y.S. 690 (1896).

The Legislature has given to the courts many mandates regarding the custody of children. See, e.g., N.Y. DOMESTIC RELATIONS LAW § 8, N.Y. PENAL LAW § 100 and NEW YORK CIVIL PRACTICE ACT §§ 1147, 1161, 1170.

That the supreme court in the instant case has exercised original jurisdiction is evident from the record. It determined the issue in its own discretion, giving due regard to the statutory superior rights of Child Care. However, it did not reach this conclusion merely on the basis of the statutory, discretionary powers of Child Care and that of the Commissioner of Welfare.

Since the court of appeals did not pass upon the issue as to the legislative mandate in conflict with the court's general jurisdiction over infants, doubt is created as to whether custody questions similar to the instant case are to be judged upon principles of administrative law or resolved by the supreme court *de novo* in the exercise of its plenary powers over infants. J.E.C.

HUSBAND AND WIFE—SEPARATION JUDGMENT RES JUDICATA UPON ACTIONS FOR DECLARATORY JUDGMENT AND ANNULMENT

The distinction between an action to declare a marriage void and an action to annul a marriage, and the problem of the court's discretion in annulment actions were subjects of controversy in a recent New York decision. In an action by the wife to annul a third-party marriage under § 1134 of the New York Civil Practice Act and for a declaratory judgment declaring her husband's Mexican divorce and remarriage a nullity, the appellate division, first department, held, per Breitel, J., that the separation judgment after the Mexican divorce and remarriage was res judicata. *Presbrey v. Presbrey,* 6 App. Div. 2d 477, 179 N.Y.S.2d 788 (1958).

In discussing the similarity between annulment actions and actions to declare a marriage void, Justice Breitel said: "An action to annul such a third-party marriage under section 1134 is no more than a form of declaratory judgment specifically authorized by statute. . . . The allegations in each cause of action are substantially the same." 6 App. Div. 477, 483, 179 N.Y.S.2d 788, 795 (1958).

In the principal case, the complaint contained two causes of action: 1) for a declaratory judgment with respect to the nullity of the divorce and remarriage of the plaintiff's husband and 2) for an annulment of his remarriage. It appears that the plaintiff-wife and the defendant-husband entered into a separation agreement which was thereafter incorporated into a separation judgment rendered in the plaintiff's favor in New York State. However, prior to the entry of judgment of separation, the defendant-husband, procured a Mexican divorce from the plaintiff who was not served, did not appear in the action and had no knowledge of the divorce. The defendants concede the invalidity of the Mexican divorce. After the divorce, but prior to the entry of the separation judgment, the husband married the co-defendant, Martha Rountree. Special Term dismissed the entire complaint relying on *Garvin v. Garvin,* 306 N.Y. 118, 116 N.E. 2d 23 (1953), which held that a declaratory judgment was unnecessary when the marital status of the wife has been fully and conclusively determined by a prior separation judgment. The appellate division, first department, affirmed, Valente, J. and M. M. Frank, J. dissenting on two grounds: 1) that an action to annul a void second marriage brought by a former spouse is distinguishable from an action for a declaratory judgment and 2) that there are different discretionary considerations for a dismissal of a declaratory judgment suit than for a cause of action for annulment. 6 App. Div. 2d 477, 485, 179 N.Y.S. 2d 788, 797 (1958).

Actions for separation and annulment and an action to declare a marriage void involve the marital res. A judgment of separation establishes the existence of a valid subsisting marriage between the parties. *Statter v. Statter,* 2 N.Y. 2d 668, 143 N.E.2d 10, 163 N.Y.S. 2d 13 (1957); *Cherubino v. Cherubino,* 284 App. Div. 731, 134 N.Y.S. 2d 573 (1954); *Garvin v. Garvin,* 306 N.Y. 118, 116 N.E. 2d 23 (1953). Annulment and declaratory judgments establish the non-existence of a valid marriage. Therefore, a prior judgment of separation is res judicata on the question of the validity of the marriage. *Warshor v. Warshor,* 130 Misc. 262, 223 N.Y.S. 705 (Sup. Ct. 1927). If a judgment of separation bars an action to declare a marriage a nullity, it should also bar an action to annul the marriage. An annulment action and an action for a declaratory judgment in respect to a void marriage have the same purpose—to declare the marriage a nullity. In this respect, the actions are identical. In the words of Justice Breitel: "To 'annul' a void marriage is to declare it null, just as to declare a void marriage null is to 'annul' it. If the remedy is unnecessary in the one case because of a subsisting separation judgment, it is unnecessary in the other case.'' 6 App. Div. 2d 477, 484, 179 N.Y.S. 2d 788, 796 (1958). Though the requirements for maintaining an annulment action under § 1134 and those for a declaratory judgment under § 493 N.Y. CIVIL PRACTICE ACT differ, a suit by a former husband or wife to annul a subsequent marriage of his or her spouse partakes of the nature of an action for a declaratory judgment seeking the invalidity of the later marriage. *Gray-Lewis v. Gray-Lewis,* 5 App. Div. 2d 238, 171 N.Y.S. 2d 364 (1958).

Valente, J. dissenting in the *Presbrey* case relies on *Baumann v. Baumann,* 222 App. Div. 460, 226 N.Y.S. 576 (1928), where the availability of an annulment action did not preclude an action for declaratory judgment; *Schneider v. Schneider,* 281 App. Div. 250, 119 N.Y.S. 2d 337 (1953), which held that the two types of suit may be maintained independently and that a dismissal of the action for declaratory judgment did not foreclose a successful suit to annul the second marriage; and *Fondiller v. Fondiller,* 182 Misc. 628, 60 N.Y.S. 2d 393 (Sup. Ct. 1944), where the court granted both a declaratory judgment and an annulment of the second marriage. But none of these cases involved the effect of a prior separation judgment upon annulment and declaratory judgment actions. ''. . . Recognition of the points of similarity between the two types of action does not import identity for all purposes.'' *Presbrey v. Presbrey,* 6 App. Div. 2d 477, 486, 179 N.Y.S. 2d 788, 798 (1958). However, it is recognized that just as a declaratory judgment may be resorted to only when the circumstances render it useful and necessary, *Solberg v. Solberg,* 263 N.Y. 1, 188 N.E. 137 (1933); *Guibord v. Guibord,* 2 App. Div. 2d 34, 153 N.Y.S. 2d 457 (1957), an annulment action will be unnecessary where there exists a prior adjudication based on a valid existing marriage.

Grutman v. Grutman, 7 Misc. 2d 236, 156 N.Y.S. 2d 521 (Sup. Ct. 1957); MANDELL, FAMILY LAW, 1958 SURVEY OF N.Y. LAW, 33 N.Y.U. L. Rev. 1257 (1958). There is a distinction between such an adjudication rendered *before* and *after* an invalid foreign divorce. In *Grutman v. Grutman, supra,* the court held that the entry of a separation judgment in the wife's favor *before* her husband obtained a Mexican divorce did not bar her from maintaining an action since the judgment did not determine the effect of a decree which had not yet come into existence. But where the separation judgment is entered *after* the Mexican divorce decree as in the *Presbrey* case, there is no need for a reaffirmation of the invalidity of the divorce decree which has been determined in the prior separation action. For the purposes of maintaining annulment and declaratory judgment actions after the entry of a separation judgment, the two causes of action are identical, and a dismissal of one necessitates a dismissal of the other.

In the absence of a statute to the contrary, an action to annul a marriage is a personal action, equitable in nature. 55 *C.J.S. Marriage,* § 49; *Berry v. Berry,* 130 App. Div. 53, 114 N.Y.S. 497 (1909). In *Evangelical Lutheran Church v. Sahlem,* 254 N.Y. 161, 172 N.E. 455 (1930), Cardozo, Chief Judge, said: ''In the award of equitable remedies there is often an element of discretion, but never a discretion that is absolute or arbitrary. In equity as at law there are signposts for the traveler. 'Discretion . . . ''must be relegated upon grounds that will make it judicial'' '.'' *Id* at 167, 172 N.E. at 457 *(dictum).* In his dissenting opinion in *Presbrey v. Presbrey, supra,* Justice Valente relying on Judge Cardozo's dictum, reached this conclusion: ''There is no discretion in equity to refuse to take jurisdiction of an annulment action.'' 6 App. Div. 2d 477, 488, 179 N.Y.S. 2d 788, 800 (1958). It seems that Justice Valente's conclusion fails to recognize the inherent discretionary power of the court in annulment actions.

Section 1134 of the N.Y. CIVIL PRACTICE ACT is the successor statute to several predecessors, the first of which was enacted in 1824 to codify the holding of Chancellor Kent that equity had jurisdiction to entertain an annulment action. *Wightman v. Wightman,* 4 Johns. Ch. R. 343 (N.Y. 1820). A party to a void marriage is not entitled as a matter of absolute right to a decree of nullity, but such decree rests to some extent in the discretion of the court and relief may be denied on equitable grounds. *Rubman v. Rubman,* 140 Misc. 658, 251 N.Y.S. 474 (1931); *Stokes v. Stokes,* 198 N.Y. 301, 91 N.E. 793 (1910). In a case decided simultaneously with the *Presbrey* case and in which the causes of action were substantially the same, the appellate division, first department, per Breitel, J. held that § 1134 does not provide an unqualified and unconditional right to an annulment merely because there is a concededly invalid marriage. *Packer v. Packer,* 6 App. Div. 2d 464, 179 N.Y.S. 2d 801 (1958). There a wife was precluded by estoppel, arising out of her conduct in procuring her husband's foreign divorce, from maintaining declaratory judgment and annulment actions in respect to her husband's remarriage.

Since both the granting of a declaratory judgment and the annulment of a marriage lie in judicial discretion, neither should be exercised in the absence of a substantial ground therefor. *Grutman v. Grutman,* 7 Misc. 2d 236, 156 N.Y.S. 2d 521 (Sup. Ct. 1957). The existence of a separation judgment establishing a valid subsisting marriage which is res judicata on the issue of marital status is a substantial ground for denying relief. In the *Presbrey* case, estoppel based on a prior judgment determining marital status, and in the *Packer* case, *supra,* estoppel based on the plaintiff's inequitable conduct are valid reasons for the exercise of the court's discretion in refusing to grant an annulment. Where a decree of annulment is unnecessary, the fact that a marriage is concededly void will not be considered by the court as a substantial ground for granting relief.

Three recent lower court decisions have granted annulments of third-party marriages under substantially the same factual situation as in the *Presbrey* case. *Fondiller v. Fondiller,* 182 Misc. 628, 50 N.Y.S. 2d 393 (Sup. Ct. 1944); *Johnson v. Johnson,* 13 Misc. 2d 891 (Sup. Ct. 1958); *Zuckert v. Zuckert,* 13 Misc. 2d 893, 179 N.Y.S. 2d 787 (Sup. Ct. 1958). However, "No appellate court has ever held that an action brought under § 1134, or its predecessor statutes, deprives the court of all discretion." 6 App. Div. 2d 477, 482, 179 N.Y.S. 2d 788, 794 (1958).

Justice Valente, in his dissent, maintains that a decree in an annulment action need not be necessary or useful and though a marriage be clearly void, a party may still obtain a decree of the court declaring the same. It is recognized that a decree of annulment will be granted though a judicial sentence of nullity is not necessary in order to free a party to a void marriage. *Pettit v. Pettit,* 105 App. Div. 312, 93 N.Y.S. 1001 (1905); *Maiorana v. Salerno,* 133 N.Y.S. 2d 521 (Sup. Ct. 1954). Nevertheless it is necessary that the decree of annulment be of some importance to society in having the question of the invalidity of the marriage judicially settled. *Earle v. Earle,* 141 App. Div. 611, 126 N.Y.S. 317 (1910). The *Presbrey* case is a holding that a separation judgment answers the question of whether a valid marriage exists, so it appears that a further action to determine marital status is of no social importance or use to the party seeking it. A wife who has a separation judgment in her favor on record would not need the additional proof of a third-party annulment judgment to establish herself as the lawful wife of her husband in any proceeding thereafter contesting her marital status. The liberal attitude expressed in the dissenting opinion in the *Presbrey* case in allowing third-party annulments which are not necessary or useful because of a prior separation judgment might unduly burden the already overcrowded matrimonial calendar. To permit spouses to determine their marital status after they have recovered separation judgments by the instigation of third-party annulment and declaratory judgment actions would divert the court's attention from more meritorious causes to unnecessary and inefficacious law suits.

The dissent in the *Presbrey* case indicates that annulments should be granted in the absence of any inequitable conduct of the plaintiff and that a subsisting separation judgment obtained by the plaintiff is not such conduct. The New York Court of Appeals, however, in two recent decisions has refused to take jurisdiction of annulment actions where the facts in issue have been or could have been decided, since the prior determination sufficiently established the marital status of the parties. *Statter v. Statter,* 2 N.Y. 2d 668, 143 N.Y.S. 2d 13 (1957); *Garvin v. Garvin,* 306 N.Y. 118, 116 N.E. 2d 23 (1953). Since a separation judgment is conclusive as to the existence of a valid marriage, the doctrine of res judicata should be permitted to bar an action to again determine the marital status.

R. T. R.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE — FAILURE TO PROVIDE ADEQUATE POLICE PROTECTION

A case of first impression has determined that where a municipal corporation actively seeks information leading to the arrest or prosecution of a dangerous criminal, and a person comes forth with such information, the municipality owes a common law duty to provide special police protection to that person where it has knowledge that his life is in danger. *Schuster v. City of New York,* 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

This recent decision by the court of appeals has created a new cause of action in tort against a municipal corporation, thus making an addition to our common law and illustrating the fact that the common law is an ever changing and expanding body of law.

Arnold Schuster informed the police of the whereabouts of Willie Sutton, a dangerous criminal of national reputation. Wide publicity attended Sutton's arrest and threats were immediately made upon Schuster's life, presumably from friends of Sutton or other members of the underworld seeking reprisal.

Partial police protection was afforded Schuster for two weeks and then withdrawn. The communications threatening reprisal continued and Schuster requested renewed police protection. The police assured him that the threats were from pranksters and refused further protection. Three weeks after informing on Sutton, Schuster was shot and killed on the evening of March 8, 1952. The killer's identity is not known to this day.

Max Schuster, father of the deceased, brought this action, as administrator of his son's estate, against the City of New

York. The complaint alleged two theories of negligence: first, that the City of New York, with knowledge that Schuster's life was in danger as a result of his informing on Sutton, refused to supply police protection upon demand, and second, after supplying police protection the city negligently withdrew it, knowing that the danger to Schuster's life had not abated. The negligence alleged was failure to use reasonable care for Schuster's security. Both theories were upheld by the court of appeals.

The city's motion to dismiss the complaint was upheld by the special term and affirmed by the appellate division but the court of appeals dismissed the motion and reinstated the complaint. Three judges concurred with the majority opinion written by Judge Van Voorhis and three judges wrote separate dissenting opinions.

This is the first reported case where a municipality has been sued for damages for failure to provide special police protection to an informer. Since waiver of sovereign immunity is a comparatively recent development in our law, the absence of such cases is not surprising.

Police protection, together with fire protection, is indisputably a governmental function, as contrasted to a proprietary function of a municipal corporation. It is a hornbook rule that a municipal corporation will not be held liable for nonperformance of a governmental function unless a statute specifically provides for such liability. General waiver of sovereign immunity will not suffice.

This impregnable rule is well stated in 38 AM. JUR., MUNICIPAL CORPORATIONS, § 620 at page 317 where it says "The protection of the citizen against . . . violence, and disorder is essentially a governmental function. . . . Accordingly, it is well settled that . . . the municipality is not liable for injuries resulting from the tortious acts while in the performance of such duties, or from their failure to enforce the law and to suppress disorder and crime. . . ."

To avoid this rule, if there is no statute imposing specific liability, a plaintiff must impute negligence directly to the municipality. Examples of such negligence are where the municipality has knowledge that a policeman is incompetent and fails to discharge him, knowing that his carrying a gun is a source of danger to the public, *McCrink v. City of New York,* 296 N.Y. 99, 71 N.E.2d 419 (1947), and where the municipality has failed to provide proper instruction to policemen in the use of firearms, *Meistinsky v. City of New York,* 309 N.Y. 998, 132 N.E.2d 900 (1956).

The NEW YORK CITY CHARTER, in section 435, enumerates the duties of the police department but speaks only in the very general terms of suppressing riots, preserving peace, arresting offenders, directing traffic, etc. The charter does not provide for liability for failure to perform these duties. As noted earlier the waiver of sovereign immunity by section 8 of the COURT OF CLAIMS ACT is of no avail unless a common law duty is established. The common law duty must be more than the duty owed to the public generally. If there is an individual duty, then the COURT OF CLAIMS ACT now allows the sovereign to be sued. *Bernadine v. City of New York,* 294 N.Y. 361, 62 N.E.2d 604 (1945).

The majority opinion did not base the duty in this case upon any provision in the NEW YORK CITY CHARTER. The court declared a new common law cause of action and expressed it as follows; ". . . the public (acting in this instance through the City of New York) owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration. . . . (W)here persons actually have aided in the apprehension or prosecution of enemies of society under the criminal law, a reciprocal duty arises on the part of society to use reasonable care for their police protection, at least where reasonably demanded or sought. . . . The duty of everyone to aid in the enforcement of the law, which is as old as history, begets an answering duty on the part of government, under the circumstances of contemporary life, reasonably to protect those who have come to its assistance in this manner.'' 5 N.Y.2d 75, 80, 81, 154 N.E.2d 534, 537, 180 N.Y.S.2d 265, 269 (1958).

Apparently recognizing the novelty of its addition to the common law of our state, the majority opinion quoted the following statement from 11 AM. JUR., COMMON LAW, § 2, pp. 154–155; ''. . . the common law is the legal embodiment of practical sense. It is a comprehensive enumeration of principles sufficiently elastic to meet the social development of the people. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs. The capacity of common law for growth and adoption to new conditions is one of its most admirable features.'' This quotation from AMERICAN JURISPRUDENCE is found in the majority opinion at 5 N.Y.2d 75, 83, 154 N.E.2d 534, 538, 539, 180 N.Y.S.2d 265, 271 (1958).

Undoubtedly the greatest stumbling block in this case, and the single point which the special term, the appellate division and the three dissenting judges found insurmountable, was to find a legal obligation owing by the municipality directly to Arnold Schuster individually.

It is clear that negligence could not be imputed to the municipality in the same sense that the *McCrink* and *Meistinsky* cases announced. Of the New York cases cited by the court these two were the most closely analogous and Judge Froessel commented succinctly on this point where he states in his dissenting opinion that, ''All of them dealt with entirely different factual patterns. . . . None of the cases relied on suggests liability for mere failure to provide police protection under the circumstances here claimed to be present.'' 5 N.Y.2d 75, 99, 154 N.E.2d 534, 548, 180 N.Y.S.2d 265, 285 (1958).

The lack of precedent disturbed each of the dissenters but equal in their concern was the 'crushing burden' that they thought this new rule would impose upon municipalities. They concluded that since a jury is to pass on the reasonableness of the police protection, around-the-clock security must be afforded to informers for long periods of time.

Justice Beldock, who wrote the only dissenting opinion in the appellate division, thought that an even larger common law duty exists, which he did not limit to informers. He stated, ''. . . in every situation which is fraught with unusual risk of injury the sovereign's knowledge of the inherent or impending dangers of the situation imposes upon it the duty to take such police precautions as the *known* circumstances would suggest to any prudent person, namely: (a) to guard the potential victim if he be known or ascertainable and if his potential assailant be unknown or unascertainable; and (b) to deter the potential assailant if he be known or ascertainable and if his potential victim be unknown or unascertainable.'' 286 App. Div. 389, 396, 143 N.Y.S.2d 778, 785 (1955).

Justice Beldock's theory would impose a legal duty upon the municipality to use reasonable care to protect each individual who the municipality knew was in impending danger. The court of appeals did not go this far, but it did create a common law duty sufficient to meet the facts in the *Schuster* case.

Recent disclosures, on both the national and state levels, of underworld empires that appear highly organized, and the wide publicity attending investigations into the brutality of these criminals has caused some of our citizenry to cower before their apparent might. Without a legal right to special police protection even the most sincere citizen can not help but be hesitant before informing on their activities. Valuable information that could lead to prosecution or arrest of this element in our society is being suppressed by sheer fright.

This decision will help to restore the channel of communication that is most effective in the fight against crime and provide information to the police which they might not otherwise obtain.

B.S.A.

PUBLIC NUISANCE—SPECIAL DAMAGE—EXTENT OF

It has long been held to be the law in New York, that a private person has a right to a private remedy against a public nuisance where he has suffered some special damage from such a nuisance, beyond that suffered by the public in general. *Flynn v. Taylor,* 127 N.Y. 596, 28 N.E. 418, (1889); *Callanan v. Gilman,* 107 N.Y. 360, 14 N.E. 264, 2 N.Y. Supp. 702 (Super. Ct. N.Y.C. 1888). In such cases it is important to remember, that this is not the situation where a public nuisance is also a private nuisance, but in these cases a private party is given a private remedy against a public nuisance as such.

The appellate division, first department, has recently ruled that substantial obstruction of a public thoroughfare is sufficient to give rise to a private remedy for injunction and damages, and it is not imperative that total obstruction be shown. Nor is it necessary to prove a particular quantum of damages, the court declared, because an owner of a private dwelling may sustain a special damage apart from any ascertainable monetary damage. *Graceland Corp. v. Consol. Laundries,* 7 App. Div. 2d 89, 180 N.Y.S. 2d 644 (1958).

Defendant laundry, for the past ten years had parked and stored its vehicles on the public sidewalk in front of its place of business on East 94th Street, New York City, in such a manner as to obstruct substantially, but not totally, the pedestrian traffic travelling over the walk. Plaintiff was the owner of three adjacent tenement houses purchased in 1955. A judgment was granted by the supreme court in New York County, giving plaintiff a permanent injunction against such usage and also nominal damages. From this judgment defendant appealed to the appellate division. *Held,* one justice dissenting, affirmed with modification of the injunction to allow defendant to avail itself of the rights given under section 82d7–15.0 of the NEW YORK CITY ADMINISTRATIVE CODE, which authorizes the backing up of vehicles on sidewalks for the purpose of loading or unloading merchandise.

The court, in an opinion by Justice Breitel, noted that the obstruction of a public street or sidewalk beyond reasonable uses is a public nuisance. The court then took cognizance of the rule that a private person has a private remedy against a public nuisance if he suffers special damage or injury. Now the court was faced with the question of what constitutes special damage.

In all the cases, in which the court of appeals had found that a party sustained special injury, the obstruction of the public thoroughfare was total. The court recognized this, but observed that when the question had arisen as to whether less than total obstruction would be adequate the courts had granted an injunction. *Crooke v. Anderson,* 23 Hun 266 (1880). Moreover, the courts said, in none of the cases which involved total obstruction, including the two leading cases, the *Callanan* case and the *Flynn* case, did the court declare such total obstruction was a prerequisite to a private party's action.

Continuing, the court declared that a showing of direct damage or a particular amount of damage is not a necessary requirement to give the plaintiff a remedy. *Flynn v. Taylor,* 127 N.Y. 596, 28 N.E. 418 (1889). The plaintiff, in the principal case, is both a merchant, in a sense, and a private land owner. A private owner, the court said, may suffer a special injury that will give rise to a right of action even though the damage is not ascertainable or measurable in a money sense. Therefore, proof of commercial damage, as offered by plaintiff in trial court, was not necessary.

The *Callanan* case was referred to several times by the court to support various rules of law. In that case, both parties were neighboring grocers. A goodly number of plaintiff's customers had to pass in front of defendant's store to reach plaintiff's place of business. Defendant obstructed the sidewalk in front of his store by means of a bridge, running from the store to the curb, which he used to load and unload groceries. It was proven that this bridge was left standing, when not in use, for periods ranging from ten minutes to two hours. Plaintiff was granted an injunction which was ultimately sustained in the court of appeals on the ground that a simple averment of the location of the parties' stores and the nature and extent of the obstruction was enough to show special damages.

The other leading case in New York, the *Flynn* case, was also cited several times in the opinion of Justice Breitel. Defendant, in the case, erected a platform the entire width of the sidewalk in front of his factory and backed up horses and carts to the platform on that part of the sidewalk not covered by it. Plaintiff was the operator of a neighboring retail liquor business. An injunction was granted and defendant appealed.

The court of appeals affirmed the judgment declaring that anyone who suffers a special damage from an unreasonable obstruction of a sidewalk has a private remedy. The right to the remedy, the court declared, arises if plaintiff sustains some injury peculiar to himself, and it does not depend on the amount of damage suffered.

In its decision, in the principal case, the court mentions the fact that injunctions have been granted where the obstruction was not total and cites the case of *Crooke v. Anderson,* 23 Hun 266 (1880). The defendant in that case extended his fence into the sidewalk so that there were but eight feet for public travel instead of nineteen feet, as there would have been if the building line were observed. Plaintiff owned several parcels of land on the same street. Defendant was given judgment and plaintiff appealed.

The appellate division, second department, reversed, holding that access to plaintiff's land was so affected that he has a right to a remedy. Anyone peculiarly injured by a public nuisance has a private remedy, the court said, and the partial obstruction by defendant gave plaintiff the requisite damage.

The effect of the principal case, when viewed against the background of the *Callanan* and *Flynn* cases is that substantial obstruction of a public thoroughfare is sufficient to prove special damage from a public nuisance. Also, it is not necessary to show any particular amount of damage, or a pecuniary loss. It is important, however, to keep in mind that this specific question has never been passed upon by the court of appeals and the rule of the principal case is still subject to either affirmance or rejection by the highest court of the state.

H.L.T.

SALES—PRIVITY OF CONTRACT—WARRANTIES

The rule requiring privity of contract for recovery of damages in actions based upon a breach of an implied warranty of fitness of food for human consumption has in recent years met with increasing disapproval by the lower courts in New York State. An indication of this disapproval is evidenced by the recently decided case of *Greenberg v. Lorenz*, 12 Misc.2d 883, 178 N.Y.S.2d 407 (Sup. Ct. 1958). There, defendants conducted a retail grocery store at which the father of the infant plaintiff purchased a can of brand-name salmon which the same day was prepared and served at the family's evening meal. Plaintiff, a girl fifteen years of age, bit into a portion of this salmon in which was embedded a metal fish tag shaped like a pin, to which were attached two small plastic discs. As a result she suffered a fracture of her right central upper incisor and resulting infection of her cheek. In the action which followed, the City Court of the City of New York (Julius J. Gans, J.) awarded damages to both the daughter and her father, the former for her injuries and the latter for loss of services and medical expenses, both causes of action alleging a breach of the defendant's implied warranty that the salmon was wholesome and fit for human consumption.

In considering this case on appeal, the supreme court, appellate term, first department was confronted with prior decisions by the court of appeals which indicated the view of that court in respect of the privity question in warranty situations. Illustrative of such decisions is the leading case of *Chysky v. Drake Bros. Co., Inc.*, 235 N.Y. 468, 139 N.E. 576 (1923) wherein is stated 235 N.Y. at page 472, 139 N.E. at page 578:

> "The general rule is that a manufacturer or seller of food, or other articles of personal property, is not liable to third persons, under an implied warranty who have no

> contractual relations with him. The reason for this rule is that privity of contract does not exist between the seller and such third persons and unless there be privity of contract, there can be no implied warranty.''

Recognizing this and similar definitive statements of the law of New York State, the appellate court, per Hofstadter, J., affirmed the determination of the city court. In so doing a maximum of importance was placed upon the need for consumer protection and reality in the law, a minimum upon symmetry and certainty. Justice Hofstadter's thought is expressed in 12 Misc. 2d at page 885, 178 N.Y. Supp. 2d at page 409 where he says, ''Not insensible to the need of symmetry as well as certainty in the law, we conceive it to be yet more important that the law respond to reality; indeed, it need not remain insensitive to common humanity.'' His point seems well taken when one considers instances in which the successful defense of lack of privity would work particularly harsh results. Picture, for example, the purchase of baby food by a parent, resulting serious injury to or death of an infant due to the unfitness of that food, and a failure of a subsequent suit brought by the parent upon a strict application of the privity requirement. Viewed in this light a requirement of privity of contract seems an unrealistic and unnecessary limitation.

Justice Hofstadter finds justification for his decision upon the trend of recent New York decisions which he maintains depart from the strict ''*Chysky v. Drake Bros Co.* rule'' and upon its absolute rejection in other jurisdictions. Thus he cites *Ryan v. Progressive Grocery Stores,* 255 N.Y. 388, 175 N.E. 105 (1931), where recovery was allowed a husband whose wife bought food, and the more recent case of *Bowman v. Great Atlantic and Pacific Tea Co.,* 284 App. Div. 663, 133 N.Y.S.2d 904, *aff'd,* 308 N.Y. 780, 125 N.E.2d 165 (1955), where one of two sisters who lived together was allowed to enforce the implied warranty in respect of food purchased by the other. Also cited is *Blessington v. Mc-*

Crory Stores Corp., 305 N.Y. 140, 111 N.E. 2d 421 (1953), which is considered an implied recognition of the existence of an action for breach of warranty on behalf of an infant arising from a purchase made by his parent. Cases from Ohio, Iowa, Kansas, California and Illinois are likewise cited to further strengthen Justice Hofstadter's position. However, in none of the authority relied upon is the privity requirement discarded. Instead, the facts are interpreted in such a way as to find privity in situations where it was once thought non-existent, thereby granting the non-purchaser recovery. Thus various theories such as "household agency," "agency for the consumer," and "third party beneficiary" have been employed. Should the courts of New York do away with the anachronistic privity requirement, as Justice Hofstadter advocates, or should it survive and liability be extended through employment of legal fictions? When the question is presented in this way it would seem more realistic to abolish the requirement than to rationalize desired results.

The principal case is not the only recent decision of lower New York State courts which attacks the privity rule. The case of *Conklin v. Hotel Waldorf Astoria Corp.,* 5 Misc. 2d 496, 161 N.Y.S.2d 205, decided in 1957 by Justice George Starke of the New York City Court, is an example. There, two women were served lunch in defendant's dining rooms, one being injured due to the presence of foreign matter in the food, the other paying the bill. The defendant maintained that no privity of contract existed between it and the non-paying plaintiff, but the argument was disposed of by a determination that a contract arose at the time the order was placed and accepted regardless of which person later paid the bill. Though decided on the basis that a contract between the restauranteur and the injured patron did exist, the case is significant in that the defense of lack of privity of contract failed. More recently decided is the case of *Welch v. Schiebelhuth,* 11 Misc.2d 312, 169 N.Y.S.2d 309

(Sup. Ct. 1957). This case involved a cake purchased from defendant retailer. Suit was brought by the purchaser's husband and two guests who became ill after having eaten the cake. The plaintiffs' motion to amend their complaint to allege an additional cause of action for breach of warranty was opposed on the ground that no privity existed. In granting the plaintiffs' motion, the court relied upon legislation and decisions of other states and, erroneously it seems, upon legislation, recommended but thus far unsuccessful in New York State. Despite the above mentioned objection, the decision stands as another rejection of the privity rule in this state. The most recently decided case prior to the principal one is *Parish v. Great Atlantic and Pacific Tea Co.,* 13 Misc.2d 33, 177 N.Y.S.2d 7 (N.Y.C. Munic. Ct., Manhattan, June 1958). The decision of this case by Justice Starke, who also decided *Conklin v. Hotel Waldorf Astoria Corp., supra,* sets forth his conviction that the privity requirement should be totally abandoned. In the *Parish* case jam was purchased by plaintiff-mother and both she and her infant children became ill after having consumed it. Though recovery could have been justified on either an agency or third party beneficiary theory, Justice Starke chose instead to hold in 13 Misc. 2d at page 164, 177 N.Y.S. 2d at page 38 that "the archaic notion that privity is an essential to recovery in a breach of warranty action is cardinal error. It requires the acceptance of the artificial and the shutting of our eyes to the realities of life."

Accompanying the dissatisfaction in the lower courts is an attempt to perfect a change in the privity rule through legislation. At the time of this writing there is before the legislature an act to amend the PERSONAL PROPERTY LAW, in relation to warranties of the seller in a sale of goods, S.I. 863, S.P. 863; A.I. 1732, A.P. 1740. The amendment, which would add a new section 97-a to the PERSONAL PROPERTY LAW, has been recommended by the *Law Revision Com-*

mission (N.Y. State Bar Association, Circular No. 131, Feb. 27, 1959) and would extend the express or implied warranties made by the seller in a sale of goods to any natural person who is an employee, member of the household or guest of the buyer, if it is reasonable to expect that such persons may use, consume or be affected by the goods. The content of section 2–318 of the UNIFORM COMMERCIAL CODE which has been adopted in Massachusetts, Pennsylvania and Kentucky is similar to the above mentioned proposal. This section extends a seller's express or implied warranty to any natural person who is in the family or household of a buyer or who is a guest in his home, employees not being specifically included in the classification.

If the proposed legislation becomes law, the problem in the courts would be resolved. As indicated in the *Welch* case, *supra,* such legislation has been introduced in prior years but never passed, which can be interpreted as an inclination of the legislature to leave the problem with the courts. Many judges, however, such as Presiding Justice Steuer, the writer of the dissenting opinion in the principal case, maintain that any change in the present law should be promulgated by the legislature. The general rules in respect to warranties were set forth in the PERSONAL PROPERTY LAW by the legislature (Section 96 sub. 1), while the privity requirement appears to be a result of judicial construction of those general rules. *Chysky v. Drake Bros. Co.,* 235 N.Y. 468, 139 N.E. 576 (1923). Since the law of sales has been incorporated by the legislature into the PERSONAL PROPERTY LAW, it necessarily follows that such legislature should be qualified to change the law. Likewise, it seems that the above mentioned judicial construction should not be considered permanent but subject to alteration when the necessity arises. One of the more impressive arguments that Justice Hofstadter disposed of in the principal case in affirming the lower court's determination was the proposition that until reversed by the court of appeals, that court's holdings in similar cases must prevail. His position is expressed in 12 Misc. 2d at page 887, 178 N.Y.S. 2d at page 411 where he states:

> "Though it is not within the competence of an intermediate appellate court to disregard controlling precedent, nevertheless, when the higher appellate courts—breaking new ground—establish a new trend, and render it clear that if the instant question were before them they themselves would overrule earlier pronouncements, it becomes the right, nay the duty, of an intermediate court to take cognizance of it. It is then, not creating one but broadening or extending the trend already set in motion by superior authority."

Assuming Justice Hofstadter's premises to be valid, the intermediate appellate courts seem competent to extend the liability of a seller for breach of warranty. Whichever institution be the proper one to make the change, the probabilities are that it will come in the near future. This becomes apparent when one is confronted with evidence of the law in many of the other states and the agitation for a more liberal rule in New York.

Presiding Justice Steuer, dissenting in the principal case, attacks the very theory upon which a seller's liability for breach of implied warranty is based. Essentially, his argument is that while it may seem strange to the public that a purchaser can recover while a member of his family cannot, it is stranger yet that one without fault has to pay at all. In this way, Justice Steuer brings sharply into view the source of conflict between the advocates of a more liberal approach to the privity question and those who would see the present rule remain intact. Thus, it becomes necessary to balance the interests of the retailer on one hand and the general public of consumers on the other. As a practical matter, neither the retailer nor the consumer had an opportunity to protect himself in the principal case, as the defective product was in a sealed container. Of the two it seems that the retailer should be held responsible. The purchaser relies upon his knowledge and good judgment in choosing the merchandise he is to market. Instead of imposing the risk upon the general public and family units in particular, it would seem more just to place liability at the door of the instrumentality making possible the distribution of sometimes harmful products. A rule holding the retailer liable in cases such as the principal one seems less harsh when it is realized that the party ultimately responsible for the injury, that is, the manufacturer or processor, can ordinarily be impleaded by the retailer and be held liable over to him.

An extension of a seller's liability to at least the purchaser's immediate family for breach of an implied warranty of the fitness of food for human consumption appears to be justified and grounded in good sense. It seems that unless a more impressive argument than longevity is presented for requiring privity in cases such as the principal one, this ancient rule will give way to a more realistic one with greater emphasis upon consumer protection.

E.C.W.

Digest of Current New York Decisions

ATTACHMENT

A trust provided for payments to the beneficiary in the amount of five hundred dollars a month, and in the event that there was insufficient income to meet the payments, the balance was to be made up from the principal. The trustee moved to set aside and vacate a levy under a warrant of attachment upon the right and interest of the beneficiary on the ground that the trust income of the beneficiary, not being assignable, is not subject to levy under a warrant of attachment. *Held:* Motion to vacate denied. The restrictions on the alienation by the beneficiary of the trust income imposed by section 15 of the Personal Property Law and section 103 of the Real Property Law do not apply to gifts of specific amounts payable out of both income and principal. The prohibition is limited to cases where the trust is one to receive the income and apply it to the use of another. *Vorhaus v. Blair,* 14 Misc. 2d 543 (Sup. Ct. October, 1958).

ATTACHMENT

Plaintiff instituted an action against the defendant by service of summons and complaint, together with a warrant of attachment. By virtue of the attachment an automobile allegedly owned by the defendant was seized. Defendant moved to vacate and annul the warrant of attachment on the ground that plaintiff failed to deliver or mail copies of the papers on which the warrant was granted within the period specified in section 906 of the Civil Practice Act. There was no opposition to the motion and it was granted, providing that plaintiff pay the expenses of storage of the defendant's property. Now defendant moves that the damages sustained be ascertained, determined and assessed by the Court. *Held:* "For over a hundred years, there has been *statutory* authority in New York State for such a summary proceeding in connection with the vacating of an *injunction.* . . . However, I have been unable to find anywhere any *statutes* in effect at any time, past or present, authorizing the same or similiar summary procedure on the vacating of a warrant of *attachment.*" It is true that in some state jurisdictions the procedure applied for herein is authorized by statute, court rule or judicial sanction under the common-law writ of *scire facias.* There is no statute, court rule or other authority in New York State for such procedure. The motion for assessment of damages is denied. *Clare v. Guidi,* 12 Misc. 2d 807 (Sup. Ct. February, 1958).

CONSTITUTIONAL LAW

Plaintiff, ordered by the deputy sheriff of defendant county to aid in making an arrest, sustained injuries in the course of obeying the command and brought this action to recover damages against the defendant county. Section 1848 of the Penal Law declares it to be a misdemeanor to refuse to assist an officer in making an arrest and provides that a person who is injured while so aiding an officer ". . . shall have a cause of action to recover the amount of such damage or injury against the municipal corporation by which such officer is employed at the time such command is obeyed." Section 5 of article IX of the Constitution of the State of New York provides: "But the County shall never be made responsible for the acts of the sheriff." Defendant contended that by reason of the constitutional provision, section 1848 of the Penal Law was unconstitutional when applied to the county. *Held:* The county's motion to dismiss was properly denied by special term. The legislature intended to include the sheriff as well as other police officers since the county is a municipal corporation and the legislature had knowledge of this constitutional mandate when the liability portion of section 1848 was added. The statute was remedial in character and it should be upheld unless to do so would do violence to the Constitution. The meaning of the constitutional provision is ambiguous, and the legislature has construed its own powers. The courts will not overturn that construction unless it is clearly erroneous. *Sawyer v. Town of Southport,* 6 App. Div. 2d 553 (3d Dep't December, 1958).

CONSTITUTIONAL LAW—BINGO

Plaintiff, a non-profit, charitable, membership corporation, operated a weekly entertainment program for which it charged an admission fee of two dollars a person. After the entertainment was over and without additional charge, "free" games of bingo were played and prizes awarded. Members of the public were admitted free after the conclusion of the entertainment and played bingo the same as those who paid for and attended the entertainment. The district attorney notified the chief of police that all forms of bingo are illegal under the bingo amendment of the state Constitution and implementing laws until an affirmative referendum has been had in Syracuse, where plaintiff operated. Plaintiff moved to temporarily enjoin the chief of police from interfering with its nightly programs. *Held:* There was not sufficient proof to show that participants had paid a consideration for the chance so as to constitute a lottery under section 130 of the Penal Law. However, the court noted that in respect to bingo, the law has been changed by the amendment to section 9 of article I of the Constitution which deals with bingo by name, and also by the implementing statutes known as article 19-B of the Executive Law and article 14-G of the General Municipal Law. If the game is within the constitutional definition of bingo it is illegal and a consideration need not be paid. *Italian Home Federation v. Kelly,* 12 Misc. 2d 33 (Sup. Ct. July, 1958).

CONTRIBUTORY NEGLIGENCE

In a common-law negligence action, the trial court set aside a verdict in favor of plaintiff and granted defendant's motion for a directed verdict and dismissal of complaint. Plaintiff, an independent contractor, conducted the business of washing, polishing, and simonizing cars in a portion of a building occupied by defendant, an automobile agency. While plaintiff was atop a ladder buffing the top of an automobile with his own electric buffer, the bonnet of the buffer "burst up into flame." Plaintiff shut off the machine motor, descended the ladder, and laid the flaming buffer on the floor the surface of which was incrusted with grease, gasoline and oil, as well as wax and other compounds used by plaintiff in his work. Plaintiff unsuccessfully tried to stamp out the flames with his feet. He then picked up defendant's fire extinguisher which he found to be empty. Once more he unsuccessfully trampled on the fire. Finally, he seized a bucket of sand that was nearby and attempted to smother the fire by spreading sand over it by handfuls while repeatedly stamping on the fire with his feet. At this point his coverall caught fire and his leg and hands were burned. Plaintiff claimed defendant was negligent in permitting grease, oil and gasoline to collect on the floor and in failing to provide a proper fire extinguisher. *Held:* Plaintiff's activities added combustible material to the incrusted floor surface of which he was fully aware and for which he was responsible. When plaintiff exposed himself to a known danger he was under a duty to use ordinary care to avoid being injured. The defendant did not create the emergency. In the face of multiple choices, the plaintiff elected to follow the course that exposed him to danger. Under such circumstances he may be held contributorily negligent as a matter of law.

Dissent: It cannot be agreed that a plaintiff must be held guilty of contributory negligence as a matter of law when in the face of multiple choices he chooses the course which exposes him to danger. The standard which the law imposes is not that of acting correctly at one's peril, but of acting reasonably. The reason exacted is not "the reason of the morrow" but "reason fitted and proportioned to the time and the event." Whether an act, ill-advised in retrospect, may have appeared justifiable to a reasonable man under the prevailing circumstances, involves an assessment of judgment which is peculiarly within the province of the jury. *Townes v. Park Motor Sales, Inc.,* 7 App.Div. 2d 109 (1st Dep't December, 1958).

CORPORATIONS

Defendant is a New Jersey corporation not licensed to do business in New York. Its sole business is the operation of a New Jersey resort hotel catering to customers from various parts of the United States. Defendant engaged the services of a resort service located in New York City, this service quoting rates, accomodations, and activities at the defendant and other hotels. Applications are taken for the hotel but must be confirmed by the defendant. The defendant is listed in the New York City phone directory with the address of the resort service. Process on the defendant was served on the resort service. Defendant appeared specially to vacate the service of process. *Held:* Whether a foreign corporation is doing business in this state depends on the individual facts of the case. If the "minimum contact" rule of *McGee v. International Life Ins. Co.* (335

U.S. 220) is to be applied, it must be shown that the particular suit involved be one which, in reason and justice should be defended in New York. Under the facts submitted in this case such a determination cannot be made, for the nature of the cause of action sued on does not appear and the plaintiff has failed to support her claim that there is jurisdiction in the statement of facts. The motion to vacate the service of process must be granted. *Schwartz v. Breakers Hotel Corp.,* 13 Misc. 2d 508 (Sup. Ct. June, 1958).

COVENANTS

Adjoining landowners, predecessors in interest of the plaintiffs and defendant, entered into an agreement whereby the defendant's predecessor agreed to furnish heat for a building on the adjoining property of the plaintiffs' predecessor, and all necessary steam and return pipes for the operation, plaintiffs' predecessor to pay a specified annual sum. This agreement was expressly binding upon the heirs, executors, administrators, and assigns of each of the parties. There were several intermediate conveyances and assignments in the defendant's chain of title back to the original covenantor, all of these grantees agreeing in their instruments to perform the covenant. Defendant took with knowledge of the covenant but without any express assumption, and he refuses to perform. Plaintiffs are the direct successors in interest to the original covenantee and ask for an injunction requiring the defendant to supply the heat. *Held:* Certain positive or affirmative covenants, requiring an act to be done for the benefit of the owner of the dominant estate do not run with the land. Courts have imposed an exception where it can be shown that a covenant, though positive in form, in substance can be regarded as a restrictive covenant which touches and concerns the land and in substance, if not in form, there is privity of estate between the two estates. The question of whether a particular covenant touches and concerns the land must be decided on the facts of each case. Here the covenant is unlimited in time and there is no fair proportion between the amount to be paid by the plaintiffs and the actual cost of heating. "A covenant imposes a burden and confers a benefit. There should be fairness and equity between the burden and the benefit. The burden must not be too oppressive upon the land nor the benefit too gainful." Judgment dismissing the complaint is affirmed. *Nicholson v. 300 Broadway Realty Corporation,* 6 App. Div. 2d 627 (3rd Dep't December 1958).

EMINENT DOMAIN

Plaintiff sued to restrain defendant State Superintendent of Public Works from attempting to acquire by appropriation for highway purposes a part of plaintiff's hospital lands. Section 1 of chapter 659 of the laws of 1927 provides that no street, avenue, or road shall be laid out or opened through or upon any of certain described lands in the city of White Plains, and none of said land shall be taken for any use whenever and so long as it shall be owned or occupied for hospital purposes by the Society of the New York Hospital. The statute provided for dedication of other lands and payment of money by the Society which was accomplished. Chapter 653 of the laws of 1927 amended the charter of the city of White Plains to provide that "It shall be unlawful to open any streets through the grounds belonging to the society of the New York hospital . . . as long as the same is owned or occupied for hospital purposes." Under sections 30 and 340-b of the Highway Law, the Superintendent of Public Works is authorized to appropriate lands for arterial highways by eminent domain, including those which will make an interstate connection between the New York and New England thruways. Section 340-a of the Highway Law authorizes the location of one of these interstate routes as "passing through or northerly of White Plains." *Held:* To carry out these purposes, the Superintendent may not appropriate a strip of plaintiff's land presently vacant but used for hospital purposes. The exemption granted by the acts of 1927 is, though subject to repeal, traditional and valid, and public policy requires that its repeal or abrogation be evidenced by clear legislative intent. "It is not strict construction of generally worded statutes like these Highway Law sections to read them as wiping off the books the special 1927 statute passed by the Legislature as to specific lands and for a substantial consideration." *Society of N.Y. Hosp. v. Johnson,* 5 N.Y. 2d 102 (November, 1958).

EXAMINATION BEFORE TRIAL

Plaintiff appeals from an order vacating a notice of examination before trial on the ground that the notice was defective insofar as it called for the taking of defendant's testimony by electronic recording device. The use of recording devices has been approved by the first and second Departments, but was an open question in the third Department. *Held:* Neither section 302 of the Civil Practice Act providing for the person before whom the testimony is taken to record every question and answer, nor rule 129 of the Rules of Civil Practice which provides the oral examination is to be conducted the same as during trial, contemplates the use of a recording device. ". . . (T)he necessity of imposing safeguards and conditions upon the use of recording machines, and of requiring some judicial supervision as well, seems to be recognized." Since this necessity recognizes that such regulations be affected by statute or by a rule uniform throughout the state, the order should be affirmed. *Bradshaw v. Best,* 7 App. Div. 2d 137 (3rd Dep't December, 1958).

INSURANCE—DOUBLE INDEMNITY

Beneficiary instituted an action to recover double indemnity accidental death benefits under life insurance policies issued to deceased husband. The decedent underwent an operation for the removal of his gall bladder. Thereafter, complications set in and x-rays disclosed "an intestinal obstruction due to a kinking of the bowel" caused by adhesions which resulted in kidney insufficiency. An operation was performed and the kink removed. The obstruction, however, had caused irreversible damage to the kidneys and the patient died seven days later of uremic poisoning. An autopsy disclosed that new adhesions had formed again in the same area. The operating surgeon testified that he had performed some 2,000 gall bladder operations and that he had never before encountered such a condition. He asserted there was no way of determining before the operation if such would happen and that it was "unique." There was, however, expert testimony that adhesions may follow any operation. The court below directed verdict for the defendant and dismissal of plaintiff's complaint. *Held:* Unexpected consequences following an act intentionally or normally done may constitute accidental means. Where the result which followed is of a type which had not occurred in 2,000 cases one cannot say as a matter of law that it is not an accident or that death did not occur by accidental means. There was sufficient uncontradicted evidence to warrant submission of the case to the jury. (Dissent: Decisions by courts in this and other jurisdictions support the view that death by post-operative complications does not fall within the connotation of accidental death as those words are used in common parlance.) *Rosenthal v. Mutual Life Ins. Co.,* 7 App.Div. 2d 182 (1st Dep't January, 1959).

SERVICE OF SUBPOENA

An officer of the State Police attempted to serve a subpoena upon petitioner in behalf of the Commission of Investigation of the state of New York. He went to the home of petitioner and knocked on the door. Petitioner's wife appeared, and after being informed of the officer's intention to make service of process, refused to admit him, saying that petitioner was sick in bed. The next day the officer returned but was unable to get any response when he knocked on the door. He walked around the house until he came to petitioner's bedroom window, through which he saw petitioner lying in bed. He knocked on the window and showed the subpoena to petitioner but received no intelligible response. The wife appeared and pulled the curtains. The officer informed her that he was going to affix the subpoena to the door, and he did so in her presence. Immediately thereafter, the officer, by means of an amplifier which was audible a quarter of a mile away, announced several times from various positions around petitioner's house, the contents of the subpoena. The petitioner moved to set aside the service of the subpoena on the ground that it was not personally served upon him. *Held:* It was obvious that petitioner was attempting to evade service of the subpoena. It was also manifest that he had been apprised of the nature and purpose of the proceding against him, and that he had an opportunity to defend himself if he desired. ''Evasion and willful refusal of a witness to accept the lawful process of a court or a duly constituted commission cannot be countenanced without encouraging resistance to such process and disrespect for law.'' *Matter of Barbera,* 14 Misc. 2d 223 (Sup. Ct. December, 1958).

SPEED MEASURING DEVICE

The defendant was charged with a speeding violation, in that he operated his vehicle at a speed of 41 miles per hour in a 30 mile per hour zone. His speed was clocked by a speed measuring device known as the Foto-Patrol, which operates by an electronic impulse activating a strobe light and camera. When the setting of the machine, in this particular instance, 40 miles an hour, is disturbed by a speed in excess of the setting, a light flashes and the camera takes a photograph of the license plate number of the offender and provides the speed through a code. The People presented expert testimony concerning the operation of the machine which indicated that the device accurately recorded defendant's speed. This was further substantiated by tests made by police cars which had been calibrated and the unqualified opinion by a police officer as to defendant's speed. *Held:* The defendant did speed and there was sufficient proof offered to find him guilty beyond reasonable doubt, although the speed was measured for only a distance of three feet. Expert testimony was essential and the People presented such proof. *People v. Pett,* 13 Misc. 2d 975 (Police J. Ct. September, 1958).

STATUTE OF LIMITATIONS

In January, 1924 decedent and his wife executed a mortgage upon their real property, payable on January 1, 1930. There had been no payments of principal or interest for more than twenty-five years prior to the commencement of this action. Plaintiff's action was to discharge and cancel the mortgage on the ground that the running of the statute of limitations had barred an action thereon. The mortgagee produced two letters written by the deceased. The first was written on October 24, 1944 and said, ''You say I have forgotten about it, well I have not forgotten at all, as long as the debt remains. As long as I live I will have to pay the debt.'' The second letter, written seven days later was a clear acknowledgment of the mortgage debt. The defendant contended that the language of the first letter may be construed as extending the statute of limitations so that it did not commence to run until the death of decedent. *Held:* The date of death was a limitation beyond which the statute could not run. The most that the first letter did was extend the limitation up to, but not beyond, the death of deceased. There being no defense to the action, plaintiff was entitled to summary judgment. *Lorenzo v. Bussin,* 12 Misc. 2d 626 (Sup. Ct. April, 1958).

THIRD PARTY PRACTICE

Plaintiff, a construction worker, sued to recover for personal injuries sustained when he attempted to repair a defective materials hoist owned by defendant (third-party plaintiff) and controlled by one of its employees. The defendant (third-party plaintiff) sought recovery over from the third-party defendant, the contractor to whom the hoist was rented, alleging that plaintiff's injuries were attributable to the primary negligence of the third-party defendant; and that the lease agreement provided for indemnification from any liability for personal injury caused by the use of the leased equipment. *Held:* The third-party complaint should be dismissed. If, as third-party plaintiff alleges, it had nothing to do with the operation and control of the hoist at the time of the accident, it would not be liable to plaintiff at all and would, therefore, have no occasion to seek indemnification from the third-party defendant. If the hoist was operated by the third-party plaintiff's own employees, then it could be held liable only as sole tort-feasor and would not be entitled to indemnification. If the cause of the accident was the supplying of a defective hoist which was controlled and operated by the third-party defendant, they would then be joint tort-feasors and the third-party plaintiff would have no common-law right of indemnity, *Bernardo v. Fordham Hoisting Equip. Co.,* 6 App.Div. 2d 619 (1st Dep't December, 1958).

WIRE TAPPING

The indictments of respondents were based on recordings of intercepted telephone communications made pursuant to court orders under section 813-a of the Code of Criminal Procedure. Under the New York rule such evidence has been admissible. The question on the trial of respondents was whether this rule has been changed by the decision of the United States Supreme Court in *Benanti v. United States,* 355 U.S. 96, Dec. 9, 1957. Section 605 of the Federal Communications Act forbids interception of a telephone communication and divulgence thereof. Section 501 of that act makes the violation of section 605 a crime. The *Benanti* case was a federal court case, and it was held there that evidence procured pursuant to a court order under section 813-a of the Code of Criminal Procedure was inadmissible even though obtained by an officer of New York. *Held:* The evidence was admissible. It is true that the purpose behind sections 605 and 501 of the Federal Communications Act was to preclude state statutes that would permit wire tapping. "However, in the most recent case before the court of appeals on the subject, the court expressly . . . [stated] that the rule of this state . . . is not affected by the circumstance that requiring a witness to testify as to wire taps might force him to a criminal violation of the Federal Communications Act." It seems that in adhering to the New York rule, the court of appeals has done so with the realization that the introduction of this evidence was itself a crime, committed with the sanction of the trial court. *People v. Dinan,* 7 App. Div. 2d 119 (2d Dep't December, 1958).

Legislation

CIVIL PRACTICE ACT

Section 322—Amended—Admissions as to matters of fact, papers, documents, or photographs in special proceedings.

This act amends section 322 of the Civil Practice Act by adding a subdivision, 1-a, after the present subdivision 1 of that section.

Subdivision 1 sets up the procedure for admissions as to "the genuineness of any relevant papers or documents, or the correctness or fairness of representation of any relevant photographs" *in an action.*

The new subdivision, 1-a, provides for a similar procedure, as to such papers, documents, and photographs, *in a special proceeding.*

Subdivision 1-a recites, almost verbatim, the language of subsection 1, the only differences being the substitution of a special proceeding for an action in subdivision 1-a, and the changing of the time periods in which the request for admissions and the denial, or explanation in lieu thereof, are to be served on opposing parties.

Subdivision 1 provides that the request for admission be served upon the opposing party after the pleadings are closed and not later than 10 days before the trial.

Subdivision 1-a requires the request to be served after the special proceeding is instituted and not later than three days before the hearing thereof.

The denial or explanation as to the admission must be served within eight days after service of the request, under section 1, while under subsection 1-a, it must be served not less than one day before the hearing.

This act also amends subsections 2 and 3 of section 322, by inserting appropriate words to include special proceedings within the provisions of those subsections.

As a result of this legislation, then, admissions may be had in special proceedings in the same manner as in actions, with a few minor variations in procedure as to time.

This law is to take effect as of September 1, 1959.

C.H.W.

NEGOTIABLE INSTRUMENTS LAW

Section 174—Amended—time limit for notice of dishonor by mail.

This act amends that part of section 174 of the Negotiable Instruments Law, pertaining to notice of dishonor by mail where the parties reside in the same place. The amended portion reads as follows:

> "3. If sent by mail, it must be deposited in the post-office in time *to go by mail the day following, or if there be no mail at a convenient hour on that day, by the next mail thereafter.*"

The italicized words above were substituted for the phrase "to reach him in the usual course of the day following."

The words "the day following" refer to the day following that on which an instrument was dishonored. The word "he" refers to the person being notified of such dishonor. The effect of this change is to give a somewhat longer time in which to mail a notice of dishonor. The notice need not now be deposited in time to reach the person being notified, on the day following dishonor. It is sufficient that it be deposited in time to "go by mail" the day following such dishonor.

It is conceivable, however, that there may be some dispute as to what is meant by the words "to go by mail."

It could be argued, for instance, that a notice of dishonor was deposited in time "to go by mail the day following" if it were placed in a mail box in time to be picked up by the postman on that day. On the other hand, it could be said that it did not "go by mail" until it was postmarked, or even until it left the post-office on a delivery route or perhaps at several other points in its processing.

The words "deposited in the post-office" are the same as in the old statute and may constitute another related source of controversy.

It is clear, however, that the change made by this act does extend somewhat the time for mailing a notice of dishonor.

This act took effect immediately upon being signed by the Governor.

Section 226-a—Added—Tenant's right to remove fixtures.

This section, which was added to the Real Property Law, reads as follows:

> "§ 226-a. Effect of new lease on tenant's right to remove fixtures or improvements. Unless otherwise expressly agreed, where a tenant has a right to remove fixtures or improvements, such right shall not be lost or impaired by reason of his acceptance of a new lease of the same premises without any surrender of possession between terms."

This section was recommended by the Law Revision Commission for the purpose of abrogating the rule that a tenant loses his right to remove fixtures or improvements when he accepted a new lease on the same premises.

Prior to the enactment of this statute, a tenant had the right to remove certain fixtures or improvements only during the term of his lease. If a renewal of the old lease was executed, this right was not lost and could be exercised during the period for which the lease was renewed. See, N.Y. Real Property Law § 226.

However, if a new lease on the same premises was executed, instead of a renewal, the termination of the old lease cut off the tenant's right to remove such fixtures or improvements. See, *Loughran v. Ross,* 45 N.Y. 792 (1871).

As a practical matter, this distinction was purely a technicality since the tenant, in both cases, remained on the premises for another term. Yet under one method of obtaining the new term his rights would not be effected and under the other, they would be cut off.

Now, under this section, the rule has been changed so that these rights are not lost in either case, in the absence of an agreement to the contrary.

This law is to take effect on September 1, 1959.

C.H.W.

REAL PROPERTY LAW

Section 232—Amended—Holdover Tenants—Nature of term for which they may be held.

This act amends the Real Property Law by adding a new section, 232-c, which reads as follows:

> "§ 232-c. Holding over of a tenant after expiration of a term longer than one month; effect of acceptance of rent. Where a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenants holding over. In the case of such a holding over by the tenant, the landlord may proceed, in any manner permitted by law, to remove the tenant, or, if the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term."

Under the common law, a holdover tenant could be held as tenant for a new term, if the landlord chose not to evict him.

This law was recommended by the Law Revision Commission for the purpose of changing this common law rule with respect to tenants having terms longer than one month.

Its effect is to give the landlord the option of evicting the holdover tenant or allowing the tenant to continue in occupation of the premises under a tenancy from month to month. Thus a holdover tenant can never be held for a term of more than one month simply by virtue of his holding over after the expiration of his lease.

Landlords who wish to retain their former power of holding the holdover tenant for an entire new term may do so by inserting a covenant to that effect in the lease.

This law is to take effect on September 1, 1959; and will apply only to cases in which the holding over commenced on or after that date.

C.H.W.

VEHICLE AND TRAFFIC LAW

Section 93-a—Amended—Insurance coverage of out-of-state vehicles.

This act amends section 93-a, subdivision 4-c of the Vehicle and Traffic Law.

This subsection defines the insurance requirements for out-of-state vehicles. It lists the classes of insurance companies which this state will recognize as properly authorized to issue insurance policies; so that vehicles insured thereunder will comply with the New York compulsory auto insurance laws, when they use the highways of this state.

The statute, before this amendment, listed, as recognized insurers, companies authorized *by New York* and companies unauthorized by New York but *authorized to do business in the state of residence of the owner* of an out-of-state vehicle.

This amendment adds to that list companies unauthorized by New York but authorized to do business *in the state in which the vehicle is registered.*

This, obviously, effects owners who reside in one foreign state, register their vehicles in another, and drive in New York. Such persons may now comply with New York law if they are insured by a company authorized to do business in any of these three states.

This act is to take effect on October 1, 1959.

C.H.W.